Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

THE DALLAS MORNING NEWS,

Petitioner,

v.

UNITED STATES OF AMERICA, TIMOTHY JAMES MCVEIGH and TERRY LYNN NICHOLS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

H. CAMPBELL ZACHRY
Counsel of Record
PAUL C. WATLER
RACHEL E. BOEHM
JENKENS & GILCHRIST,
a Professional Corporation
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2799
Telephone: (214) 855-4500
Telecopy: (214) 855-4300

Attorneys for Petitioner
The Dallas Morning News

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

192 pp

QUESTIONS PRESENTED

I. Does the First Amendment right of access to criminal pre-trial proceedings extend to documents?

II. Is the denial of media access to court proceedings and documents immediately appealable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)?

PARTIES TO THE PROCEEDING IN THE TENTH CIRCUIT COURT OF APPEALS

Petitioner

The Dallas Morning News

Respondents

United States of America

Timothy James McVeigh

Terry Lynn Nichols

Other Parties to the Proceeding in the Tenth Circuit

The Colorado-Oklahoma Trial Group (Appellant)

The Colorado-Oklahoma Print Media Group (Appellant)

Amici Curiae

Reporters Committee for the Freedom of the Press

Newsday

Los Angeles Times

PETITIONER'S PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The Dallas Morning News, Inc. (publisher of *The Dallas Morning News*)

A.H. Belo Corporation (parent company of The Dallas Morning News, Inc.)

No non-wholly owned subsidiaries

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OPINION BELOW

The judgment and opinion of the Court of Appeals for the Tenth Circuit is published as *United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997) and is reproduced in the Appendix at pages App. 1-153.

JURISDICTION INVOKED

On July 14, 1997, the court of appeals entered its judgment affirming the district court's orders denying *The Dallas Morning News'* challenges to the sealing of certain documents in the criminal trials arising out of the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case involves the First Amendment to the U.S. Constitution, which provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech or of the press . . . " U.S. Const. Amend. I.

This case also involves the Sixth Amendment to the U.S. Constitution, which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State

and district wherein the crime shall have been committed . . . " U.S. Const. Amend. VI.

This case also involves section 1291 of Title 28, which provides in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . . "

STATEMENT OF THE CASE

This case arises from the extensive sealing of court records by the district court in the Oklahoma City bombing case. It requires the Court to decide whether the First Amendment right of access of the public and the press extends to documents submitted in critical pre-trial proceedings in criminal cases. Until the Tenth Circuit's decision in this case, the line of numerous federal circuit court cases finding such a First Amendment right of access had been unbroken.

Before deciding *The Dallas Morning News'* (*"The News"*) appeal in the present case, the Tenth Circuit had not confronted the issue of the media's right of access to documents filed in connection with criminal court proceedings.[1] The Tenth Circuit's refusal in the opinion

[1] In *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994), the Tenth Circuit stated that under Supreme Court precedent, a First Amendment right of access inheres only in limited situtations where "a tradition of access implies the favorable judgment of experience[ ] . . . and where "public access plays a significant positive role in the functioning of the particular process in question." *Lanphere &*

below to either acknowledge or reject a First Amendment right of access to criminal documents directly conflicts with previous circuit court decisions. No other federal circuit court has refused to find a First Amendment right of access to criminal court documents.

This Court last decided a major First Amendment courtroom access case more than 10 years ago. In *Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*, 478 U.S. 1 (1986), the Court made clear that the public's First Amendment right of access to attend criminal trials extends to the right to attend certain pre-trial proceedings. This Court should revisit the access issue to provide guidance to the lower courts. Only this Court can resolve the split among the circuits as to whether the public's constitutional right of access to criminal trials stops with the proceedings themselves, or whether it extends to documents filed in connection with those proceedings. In an era when documents play an increasingly important role in our criminal justice system, a decision of the issue by this Court will be most timely.

I. Facts Material to Consideration of the Questions Presented

At 9:02 a.m. on Wednesday, April 19, 1995, a 4,800-pound bomb made of fertilizer and fuel oil destroyed the

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Urbaniak, 21 F.3d at 1512 (citing *Press-Enterprise II*). In the opinion below, the Tenth Circuit stated that in *Lanphere*, it was "suggesting the possibility of using the First Amendment standard in those limited circumstances where experience and logic support public access to judicial documents." App. at 14.

nine-story Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. The blast killed 168 people, including 19 children. Hundreds more were injured. Many of the children killed were infants enrolled in America's Kids day care center on the second floor of the federal building. The bomb instantly transformed a part of America's heartland into a scene resembling war-torn Beirut. The blast dug an eight-foot crater and spread glass, bricks, and debris over a square-mile area. The United States courthouse, located directly across the street from the Murrah Federal Building, was also damaged. Shock waves were felt 30 miles away.

As the injured and the dead were pulled from the rubble, the attention of the entire nation turned to Oklahoma City. President Clinton described the bombing as an attack on the United States and declared a national day of mourning. Few events in modern time have so shocked the nation or galvanized its attention. Authorities launched a massive investigation to search for the persons responsible for the nation's worst act of domestic terrorism. Timothy James McVeigh and Terry Lynn Nichols were arrested and charged with capital crimes in the bombing.[2]

From the outset, the Oklahoma City bombing case was a matter of enormous interest to the public and the press. Also from the outset, large parts of the Court's file were routinely sealed from public inspection. In late 1995,

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[2] McVeigh has subsequently been convicted and sentenced to death. Jury selection in Nichols' trial began Monday, September 29.

numerous news organizations covering the case, including *The News*, filed motions seeking access to the sealed documents and requesting that procedures be established for future sealing requests. In one of his earliest written opinions after being appointed to preside over the case, Colorado District Court Judge Richard P. Matsch, in a memorandum opinion and order dated January 24, 1996 (the "January 24 opinion"), decided those motions, setting forth detailed procedures for sealing documents and articulating standards for deciding media motions to open sealed documents. App. at 45-53. Those standards were based on this Court's opinion in *Press-Enterprise II*. Under the district court's January 24 opinion, motions to open sealed documents were to be determined by the following questions:

> (1) whether the matter involved activity within the tradition of free public access to information concerning criminal prosecutions;
>
> (2) whether public access might play a significant positive role in the activity and in the functioning of the process;
>
> (3) whether there was a substantial probability that some recognized interest of higher value than public access to information will be prejudiced or affected adversely by the disclosure;
>
> (4) whether the need for protection of that interest overrode the qualified First Amendment right of access; and

(5) whether closure by the court was essential to protect that interest, considering all reasonable alternatives.

App. at 45.

Despite its January 24 opinion, the district court went on to seal scores of documents in the days and weeks before McVeigh's trial, consistently justifying those sealings with broad, perfunctory conclusions that the release of the documents would create pre-trial publicity that would jeopardize McVeigh and Nichols' right to a fair trial. Stephen Jones, counsel for Defendant McVeigh, noted the numerous sealings at a January 3, 1997 hearing when he expressed "our concern that there is too much, if I could use the word, if there is such a word, 'routinization' of filing sealed documents in this case."

Many of the sealed documents played important roles in critical pre-trial severance and suppression proceedings – proceedings which determined key evidentiary and procedural issues that almost certainly played important roles in McVeigh's ultimate conviction and will surely be factors in Nichols' current trial.

The News objected to the sealing of three categories of these key documents. All of the documents that were sealed over the objections of *The News* related, in some way, to Nichols' extraordinary nine-hour interview with police. First, Nichols filed his motion to suppress, arguing that his nine-hour statement was involuntary and was procured in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). As an exhibit to his motion to suppress, Nichols submitted F.B.I. 302s describing the statement. That exhibit was sealed by the district court along with

Nichols' motion.[3] Next, the raw notes of F.B.I. Agent Stephen E. Smith used to create the F.B.I. 302s were repeatedly offered as an exhibit, Government Exhibit 72, during the hearing on motions to suppress. Government Exhibit 72 was also sealed by the district court. Finally, McVeigh submitted his motion for severance, which centered on expected testimony of F.B.I. agents about Nichols' statement. McVeigh's motion for severance and the accompanying exhibits were also sealed by the district court.

Nichols' motion to suppress and the accompanying exhibits were the subject of a four day public hearing, in which 28 witnesses testified and 213 exhibits were entered into evidence. The suppression hearing was an enormously important part of the pre-trial proceedings in the criminal cases arising from the Oklahoma City bombing. The documents filed by Nichols and Exhibit 72 are critical to the public's understanding of the issues raised and resolved in the hearing. Similarly, the documents filed by both defendants in connection with their motions for separate trials are essential to the public's understanding of the district court's decision to grant McVeigh and Nichols separate trials, although alleged to be co-conspirators in the bombing.

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[3] Nichols' motion to suppress also complained of warrantless searches of his home and truck and allegedly unlawful searches based on warrants. The exhibits to Nichols' motion, including search warrants, affidavits, and inventories of items seized by authorities, were sealed along with Government Exhibit 72 and the motion to suppress.

The sealing of documents was the subject of two appeals by *The News:* (1) an appeal filed by *The News* as the sole appellant (No. 96-1409); and (2) a joint appeal filed by *The News* and the Colorado-Oklahoma Trial Group and the Colorado-Oklahoma Print Media Group (the "Media Representatives") (No. 96-1464).[4] These two appeals were consolidated by the Tenth Circuit for the purposes of briefing and submission.

II. Basis for Federal Jurisdiction in the Appellate Court

The News posited that its challenges to the district court's sealing orders should have been treated as an appeal under the collateral order doctrine. 28 U.S.C. § 1291; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As the majority of federal circuit courts have recognized, an order denying access to court documents falls in that class of decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

The Tenth Circuit disagreed, concluding that mandamus is the proper vehicle for reviewing court orders sealing or redacting court documents in criminal proceedings. App. at 8. Hence, the Tenth Circuit treated *The News'*

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[4] The Media Representatives are not a party to this Petition. *The News* was a member of the Colorado-Oklahoma Print Media Group.

asserted appeal as a petition for writ of mandamus pursuant to Fed. R. App. P. 21(a).

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Decide Whether the First Amendment Right of Access Extends to Documents Filed in Connection with Criminal Pre-trial Proceedings

The public's First Amendment right to attend criminal trials and criminal pre-trial proceedings has been clearly established by this Court in a series of decisions culminating with *Press-Enterprise II*. However, this Court has never addressed the next logical question that arises in connection with issues relating to courtroom access: whether a First Amendment right of access also extends to documents filed in connection with those hearings.

The issue has developed in the federal circuit courts of appeal, although not always consistently, as shown by this case. The Tenth Circuit's failure to recognize a First Amendment right of access to court documents conflicts with numerous opinions by federal circuit courts that have recognized the right. The Tenth Circuit's opinion also weakens key procedural safeguards established by this Court in *Press-Enterprise II* and applied by other federal circuits in cases involving public access to criminal court records. The Tenth Circuit's opinion is certain to create confusion for the courts as well as the public, the press and parties to criminal cases.

The public's right of access to judicial documents is an important question of federal law that has not been,

but should be, settled by this Court. *The News* urges this Court to take up this important constitutional issue and provide guidance to the public, the press and the courts.

The News acknowledges that any decision by this Court on the questions presented in this petition would come long after the criminal trials of McVeigh and Nichols have concluded. In addition, the district court has suggested that the documents sought by *The News* may eventually be unsealed. App. at 44, 129. However, it is well-recognized that cases involving the public's access to court records and proceedings fall within the exception to the mootness rule which permits judicial review when the dispute is "capable of repetition, yet evading review." *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (access to criminal trials); *United States v. Antar*, 38 F.3d 1348, 1356 (3d Cir. 1994) (access to voir dire transcript); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63 (4th Cir. 1989) (public access to search warrant affidavit); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976) (prior restraint on pre-trial publicity).

A. The public has a First Amendment Right of Access to Documents Filed in Connection with Pre-trial Proceedings in a Criminal Case

The public's First Amendment right to attend criminal trials has been firmly established by this Court. *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*"), 464 U.S. 501, 511 (1984) (public has a First Amendment right of access to transcript of voir dire proceedings in criminal case); *Richmond Newspapers*, 448 U.S. at 580 (plurality opinion recognizing a First Amendment right of access to

criminal trials). Access to criminal trials "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508.

As indicated, the standards and procedures articulated by the district court for deciding media motions to open sealed documents in the criminal trials of McVeigh and Nichols were based on this Court's opinion in *Press-Enterprise II*, in which this Court held that there is a First Amendment right of access to pre-trial proceedings in criminal cases. The First Amendment right of access extends to pre-trial hearings (1) that traditionally have been conducted in an open fashion; and (2) where public access would help curb prosecutorial and judicial misconduct or would play a "significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8; *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982).

Every United States Court of Appeals to address the question after the decision in *Press-Enterprise II* has recognized the First Amendment right of the public and press to view court records in criminal proceedings until the decision below of the Tenth Circuit. Since *Press-Enterprise II* was decided, nine federal circuit courts – the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and the District of Columbia Circuit – have found a First

Amendment right of access to judicial documents.[5] *See, e.g., The Washington Post v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991) ("The first amendment guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed"); *Oregonian Publ'g Co. v. United States District Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) ("Under the first amendment, the press and the public have a presumed right of access to court proceedings and documents."), *cert. denied*, 501 U.S. 1210 (1991); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (public has a First Amendment right of access to records submitted in connection with criminal proceedings); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (First Amendment right of access applies to documents filed in connection with search warrant applications), *cert. denied*, 488 U.S. 1009 (1989); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) ("this court has held that the first amendment right of access extends to documents submitted in connection with a judicial proceeding"); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (qualified First Amendment right of access extends to documents filed in connection with plea hearings); *In re NBC, Inc.*, 828 F.2d 340, 345 (6th Cir. 1987) (qualified right of access applies to pre-trial documents pertaining to proceedings for disqualifying a judge); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (First

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[5] Counsel has been unable to locate any case decided after the Court's *Press-Enterprise II* decision in which the Fifth or Eleventh circuit has directly addressed the issue of a First Amendment right to court records.

Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases); *United States v. Smith*, 1997 U.S. App. LEXIS 22297 at *16 (3d Cir. 1997) (First Amendment right of access to criminal proceedings is extended "to the records and briefs that are associated with those proceedings").

In determining whether the First Amendment right of access attaches to a particular document, the majority of federal courts recognizing a First Amendment right of access to documents have applied the "experience and logic" test from *Press-Enterprise II*. *E.g.*, *Robinson*, 935 F.2d at 288; *Oregonian Publ'g Co.*, 920 F.2d at 1465; *Pokaski*, 868 F.2d at 502 & n.10, 509; *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 573; *Corbitt*, 879 F.2d at 228-29; *Smith*, 1997 U.S. App. LEXIS 22297, at *16. Under *Press-Enterprise II*, a First Amendment right of access attaches to hearings (1) that traditionally have been conducted in an open fashion (the "experience" prong); and (2) where public access would help curb prosecutorial and judicial misconduct or would play a "significant positive role in the functioning of the particular process in question" (the "logic" prong). *Press-Enterprise II*, 478 U.S. at 8.

Thus, in determining whether a First Amendment right of access attaches to a particular document, a reviewing court should consider whether the particular document has traditionally been open to the public and whether public access to the document would help curb prosecutorial and judicial misconduct. However, this determination should not be made in a vacuum. Any consideration of the "experience" prong of the test

should be interpreted in light of current conditions and practices. As the Third Circuit recognized in *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982),

> [I]t is clear that the relative importance of pre-trial procedure to that of trial has grown immensely in the last two hundred years. Thus, because the Supreme Court has accepted the view that the first amendment is to be interpreted in light of current values and conditions . . . we proceed to examine the current role of the first amendment and the societal interests in open pre-trial criminal proceedings.

Criden, 675 F.2d at 555 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Despite the clear majority of federal circuit courts that have recognized a First Amendment right of access to documents filed in connection with criminal trials, the Tenth Circuit refused to decide the issue, stating, "for the purposes of this opinion, we assume without deciding that access to judicial documents is governed by the analysis articulated in *Press-Enterprise II*." App. at 14.

The Tenth Circuit's refusal to decide whether there is – or is not – a First Amendment right of access to documents filed in connection with criminal proceedings constitutes a clear conflict with the majority of the courts of appeals that have recognized such a right. No other federal circuit court faced with the question has refused to find a First Amendment right of access to documents filed in connection with criminal proceedings. The Tenth Circuit's opinion will confuse the issue of the public's right of access to judicial documents, making it harder for

criminal court judges to rule on access issues and throwing doubt upon the nature and extent of the public's rights to documents in criminal proceedings. By casting doubt upon an area of law that was previously settled by the federal circuit courts in a case of the importance of this one, the Tenth Circuit's failure to decide the issue is as damaging to the public's First Amendment rights as affirmatively finding that no First Amendment right of access exists.

B. The Public's Understanding of Criminal Proceedings is Critical to our Democratic System of Government

Although access to judicial proceedings and the documents that help explain those proceedings is always essential to our democratic system of government, the tragedy of the Oklahoma City bombing highlights the importance of public access to information about criminal trials. The American public will have no way of knowing whether justice was done unless it has the opportunity to observe these criminal prosecutions – both the pre-trial proceedings and the trials themselves – in a meaningful way. As Chief Justice Burger observed:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.
>
> . . . .
>
> Civilized societies withdraw both from the victim and the vigilante the enforcement of

> criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.

Richmond Newspapers, 448 U.S. at 570-71 (citations omitted).

In addition to serving an important therapeutic purpose, public access to documents filed and submitted in connection with a criminal proceeding "diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness." *Leucadia Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (quoting *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991)).

Public access to court documents is especially important in federal courts, where judges serve for life. Although the federal courts are checked by the system of appellate review, "professional and public monitoring is

an essential feature of democratic control. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).

C. Criminal Court Documents Should Not be Sealed Without Satisfying the Standards of *Press-Enterprise II*.

1. The "substantial probability" standard

The federal circuit courts that have held there is a First Amendment right of access to court documents have defined the scope of that First Amendment right by applying the substantive and procedural standards set forth in the Court's opinion in *Press-Enterprise II*. Consistent with *Press-Enterprise II*, the federal circuit courts have held that once it is determined that a First Amendment right of access attaches with regard to a particular document sought to be sealed, the trial court must decide whether the facts surrounding the document present those rare circumstances in which the public's First Amendment rights are outweighed by a countervailing interest of the highest order, including the criminal defendant's Sixth Amendment right to a fair trial.

This Court has recognized that in "limited circumstances," the right of the defendant to a fair trial may be undermined by publicity. *Press-Enterprise II*, 478 U.S. at 9. In weighing these interests, a presumption arises in favor

of access. This presumption may be overcome only by an "overriding interest" against public access. *Id.*

If, as in the present case, the interest asserted to justify sealing is the right of the accused to a fair trial, closure must be preceded by a determination that "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise II*, 478 U.S. at 14.

The "substantial probability" standard constitutes a significant burden for a party seeking to deny public access to judicial records. It requires more than a mere "reasonable likelihood" that the release of the documents would prejudice a defendant's fair trial rights. *Press-Enterprise II*, 478 U.S. at 14. Thus, it is not enough that the documents reasonably may be believed likely to cause publicity and that such publicity reasonably may be believed likely to prejudice McVeigh and Nichols' fair trial rights. Instead, the Constitution requires a "substantial probability" that publicity stemming from the release of the documents would deny McVeigh and Nichols a fair trial. "The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]." *Id.* at 15.

2. Alternatives to sealing must be considered

Where the interest asserted in denying access is the right of a criminal defendant to a fair trial, and the

defendants argue that publicity concerning pre-trial proceedings might provide potential jurors with information that would be inadmissible at trial, a court must consider whether alternatives short of denying access, such as *voir dire* and juror admonishments, would protect the defendant's fair trial right. *Press-Enterprise II*, 478 U.S. at 14-15. As the *Press-Enterprise II* court specifically noted, "Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Id.* at 15. Indeed, *voir dire* proved effective in the McVeigh case in protecting his right to a fair trial.

3. Sealing must be supported by specific findings

Where there is a First Amendment right of access to a particular document, any countervailing interest that allegedly justifies denying access to the document, such as the defendant's right to a fair trial, "is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise II*, 478 U.S. at 9-10. In such a case, any decision to deny access to records must be supported by findings that (1) closure is essential to preserve higher values; and (2) is narrowly tailored to serve that interest. *Id.* at 9.

In addition, in order to make appellate review possible, the district court must also set forth specific findings on the record explicitly stating the reasons for the rejection of alternatives to the sealing of judicial records, such

as *voir dire* and cautionary jury instructions. *Press-Enterprise II*, 478 U.S. at 14; *United States v. Criden*, 675 F.2d 550, 560 (3d Cir. 1982).

The specific finding requirement of *Press-Enterprise II* serves two purposes. First, specific findings allow the reviewing court to intelligently determine whether the prerequisites for sealing documents under *Press-Enterprise II* have been met. Second, and just as important, specific findings require a district court to carefully consider whether a particular document may be sealed. When a district court makes the requisite findings, there is a greater chance that the court's decision will not violate the public's First Amendment rights. The Third Circuit recognized this dual role of the specific findings requirement in *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994). There, the Court stated, "the requirement that particularized findings of a compelling interest must be placed on the record before a hearing is closed or a record sealed is not only for the benefit of the reviewing court on appeal. It exists, most fundamentally, to assure careful analysis by the district court before any limitation is imposed, because reversal on review cannot fully vindicate First Amendment rights." *Antar*, 38 F.3d at 1362.

D. The Tenth Circuit Erred in Applying the *Press-Enterprise II* Standards

1. The Tenth Circuit's conclusion that the public may be denied access to documents so long as it has access to the hearing at which those documents are discussed presents an important constitutional issue that should be decided by this Court

Throughout the appeals process in this case, McVeigh and Nichols consistently argued that because the public had access to the suppression and severance hearings in this case and has had access to some of the documents, that somehow diminishes their right of access to the remainder of the documents submitted in connection with those hearings. In the opinion below, the Tenth Circuit apparently adopted this reasoning, stating "[i]t is uncertain whether the Tenth Circuit would apply First Amendment standards of *Press Enterprise II* . . . to a media request for access to court documents, where, as here, the press was present at the hearings involving those documents." App. at 12.

With regard to the suppression documents, the Tenth Circuit concluded:

> Access to the redacted information is not needed for a full understanding of the court's decision on the motion to suppress, as the suppression hearing itself was open, and the court order provided a detailed outline of the reasons for its conclusion that the statements were inadmissible in the McVeigh trial. The court held a four-day long public suppression hearing, issued a publicly available order, and made

> available to the public redacted versions of the motions to suppress and attached exhibits. Thus, both the press and the public had ample opportunity to understand the circumstances surrounding Nichols' statements, and the reasons why those statements were deemed inadmissible against McVeigh.

App. at 17. Similarly, the Tenth Circuit concluded that because the public had access to the suppression hearing, it had no need to view Exhibit 72, the F.B.I. notes of Nichols' nine-hour interview with authorities at the Herington police station:

> Moreover, through attending the public suppression hearing or reading the publicly available transcripts of that hearing, the press and public had ample opportunity to understand the general nature of and circumstances surrounding Exhibit 72, and the district court's rationale for ruling it inadmissible.

App. at 18.

The Tenth Circuit has apparently concluded that so long as the public has had access to hearings, the public need not view the documents critical to those hearings. The Tenth Circuit's opinion indicates that this was a determinative factor in affirming the district court's sealing orders. This conclusion establishes a dangerous precedent that will impair the public's constitutional right of effective access to criminal trials. Regardless of whether the public has had access to hearings in a criminal case, without access to documents, the public's right of access to criminal trials and proceedings is severely impaired.

The public's right to attend a trial does not amount to much unless the public also has access to the documents that explain it. If the public is allowed access to hearings but not the key documents filed in connection with those hearings, the goals furthered by public access will be subverted. *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) ("without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system"); *Associated Press, Inc. v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("[t]here is no reason to distinguish between pre-trial proceedings and documents filed in regard to them").

The documents filed in a criminal case – documents which indicate the issues and evidence before the court, the positions of the parties, and the process of the proceedings – often are more relevant to an understanding of the proceedings than attendance at the hearings in the case. Moreover, to conclude that the public has no right to court documents so long as it has access to court proceedings would allow prosecutors, criminal defendants and courts to shield criminal proceedings from public view by briefing the most substantive points in motions or other court documents and holding a public hearing that would only make sense to those who had seen the documents. Whether or not the public has had access to hearings at which relevant documents were discussed should not be the determinative factor in deciding whether the public has a right of access to those documents.

2. The Tenth Circuit's conclusion that the public has no First Amendment right of access to inadmissible evidence presents an important constitutional issue that should be decided by this Court

Throughout the pre-trial proceedings in this case, the parties and the district court have consistently justified the sealing of documents on the grounds that the documents would not be admissible at trial. The Tenth Circuit agreed, concluding that "[n]either tradition nor logic supports public access to inadmissible evidence." App. at 16.

Under the *Press-Enterprise II* analysis, the admissibility of a document at trial is irrelevant in determining whether the public has a First Amendment right to the document. Rather, the party seeking to seal the document must show either (1) that a First Amendment right of access does not attach to the document or (2) that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and that alternatives to sealing, such as *voir dire* and juror admonitions, would not protect the defendant's right to a fair trial. Admissibility at trial is not the standard for determining whether a particular document must be released to the public under *Press-Enterprise II*.

Even if documents sought by appellants are never formally admitted into evidence, once those documents came to the attention of the district court by virtue of their being filed with the court, they "can be fairly assumed to play a role in the court's deliberations." *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404, 409 (1st

Cir. 1987). The cases cited by the Tenth Circuit in support of its assertion that "the right of access to suppression hearings and accompanying motions does not extend to the evidence actually ruled inadmissible in such a hearing," App. at 16, were decided before this Court's decision in *Press-Enterprise II* and are moreover inapplicable in the present case, where Exhibit 72 was offered into evidence in its entirety and where Nichols' motion to suppress and the accompanying exhibits were filed with the court as part of Nichols' substantive pleadings and were the centerpiece of a four-day public hearing in which 28 witnesses testified and 213 exhibits were entered into evidence.

In any highly publicized criminal trial, there may be many documents which have been the subject of pre-trial publicity, and not all of those documents will be admissible at trial. Still, jurors are able to render verdicts based on the evidence presented before them. There is no inherent reason why a properly selected and sworn jury would not have been able to do the same in this case. As the Fourth Circuit has observed:

> [A]dmissibility at trial cannot be the sole determinant of pre-trial disclosure . . . If information could never be disclosed simply because it might be inadmissible at trial, much about the world of crime and the operation of the criminal justice system would be withdrawn from public view . . . [A] properly conducted *voir dire* should guarantee a fair trial for the Defendant.

In re Application and Affidavit for a Search Warrant, 923 F.2d 324, 330 (4th Cir.), *cert. denied*, 500 U.S. 944 (1991).

II. This Court Should Decide the Mode of Appellate Review

The News asserted below that its challenges to the district court's orders sealing documents should have been treated as an appeal under the collateral order doctrine. 28 U.S.C. § 1291; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As the majority of federal circuit courts have recognized, an order denying access to court documents falls in that class of decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

The clear majority of federal circuit courts that have considered the issue have recognized the applicability of the collateral order doctrine in cases involving a district court's denial of media access to court documents. The Second, Third, Fifth, Sixth, Seventh and Eleventh circuit courts have held that district court orders denying press access to judicial proceedings or documents are immediately appealable. *E.g., United States v. Antar*, 38 F.3d 1348, 1355-56 (3d Cir. 1994); *United States v. Cojab*, 996 F.2d 1404, 1406 (2d Cir. 1993); *United States v. Corbitt*, 879 F.2d 224, 227 n.1 (7th Cir. 1989); *In re NBC, Inc.*, 828 F.2d 340, 343 (6th Cir. 1987); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983); *United States v. Gurney*, 558 F.2d 1202, 1207 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

In the opinion below, the Tenth Circuit joined the First, Fourth, Eighth and Ninth Circuits in reviewing

denials of access by mandamus. *Oregonian Publ'g Co. v. United States District Court*, 920 F.2d 1462, 1464 (9th Cir. 1990), *cert. denied*, 501 U.S. 1210 (1991); *In re Washington Post Co.*, 807 F.2d 383, 388 (4th Cir. 1986); *In re Globe Newspaper Co.*, 729 F.2d 47, 50 (1st Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 660 (8th Cir. 1983).

Petitioner believes appeal is the appropriate remedy in cases involving a district court's denial of public access to criminal trials because such orders by district courts have sufficient finality to permit appeal and because of the importance of the First Amendment issues involved.

However, even if this Court determines that mandamus is the appropriate method of review in cases involving media access to court hearings and documents, it should clarify the standard of review to be used in such actions. In the present case, the Tenth Circuit reviewed *The News'* objections to the district court's sealing orders according to the "abuse of discretion" standard under which courts normally review mandamus actions. App. at 19. As the Tenth Circuit noted in upholding the district court's sealing orders with regard to the severance documents, "[p]articularly in light of the abuse of discretion standard applicable to this mandamus action, we decline to second-guess the district court's conclusion on the record before us." App. at 19. This permissive standard of review is prohibited by the First Amendment.

The standard of review under the First Amendment right of access is itself of constitutional dimension. The scope of review is plenary and substantially broader than that for abuse of discretion. *Antar*, 38 F.3d at 1357; *United*

States v. Simone, 14 F.3d 833, 837 (3d Cir. 1994). Where denial of access is reviewed by mandamus rather than by appeal, "the key factor to be considered is whether the district court's order is clearly erroneous as a matter of law." *Oregonian Publ'g Co.*, 920 F.2d 1462, 1465 (9th Cir. 1990). "An order denying access . . . must satisfy both the procedural and substantive requirements of the first amendment." *Id.* at 1466.

The First Amendment right of access requires that the appellate court undertake a broad review of a district court's determinations regarding access to judicial records. *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 92 (3d Cir. 1990); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986). Where a First Amendment right of access applies to a particular court document, an appellate court should conduct an independent consideration of the district court's order and the factual findings inferred from the evidence before the district court in determining if denial of access to that document is proper. *Capital Cities/ABC*, 913 F.2d at 92.

CONCLUSION

For the foregoing reasons, Petitioner *The Dallas Morning News* respectfully requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

H. CAMPBELL ZACHRY
Counsel of Record
PAUL C. WATLER
RACHEL E. BOEHM
JENKENS & GILCHRIST,
a Professional Corporation
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2799
Telephone: (214) 855-4500
Telecopy: (214) 855-4300

Attorneys for Petitioner
the Dallas Morning News

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES, Plaintiff-Appellee, v. TIMOTHY JAMES MCVEIGH and TERRY LYNN NICHOLS, Defendants-Appellees, APPEAL OF THE DALLAS MORNING NEWS, THE COLORADO-OKLAHOMA TRIAL GROUP, AND THE COLORADO-OKLAHOMA PRINT MEDIA GROUP ("Media Representatives"), Movants-Appellants.	No. 96-1409, 96-1464 (Filed Jul. 14, 1997)
REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, NEWSDAY, AND THE LOS ANGELES TIMES, Amici Curiae.	

Appeal from the United States District Court for the District of Colorado (D.C. No. 96-CR-68-M)

Douglas Letter, Appellate Litigation Counsel, Civil Division, Department of Justice, Washington, D.C., for the

United States (Joseph H. Hartzler, and Sean Connelly, Special Attorneys to the United States Attorney General, with him on the briefs).

Stephen Jones, Jones Wyatt & Roberts, Denver, Colorado, for Timothy James McVeigh (Robert Nigh, Richard H. Burr III, and Jeralyn E. Merritt, with him on the briefs); Michael E. Tigar, for Terry Lynn Nichols (Ronald G. Woods, N. Reid Neureiter, Adam Thurschwell, and Jane B. Tigar, Denver, Colorado, with him on the briefs).

Paul B. Watler, Jenkins & Gilchrist, Dallas, Texas, for the Media Representatives (Rachel E. Boehm, Jenkins & Gilchrist, Thomas B. Kelly, Steven D. Zansberg, and Faegre & Benson, Denver, Colorado, with him on the briefs).

Jane E. Kirtley, Reporters Committee for Freedom of the Press, Arlington, Virginia, for Amici Curiae Reporters Committee for the Freedom of the Press, Newsday, and the Los Angeles Times (Barbara Lerner, Reporters Committee for Freedom of the Press, Carolyn Schurr, Newsday, Melville, New York, Karlene W. Goller, Los Angeles Times, Los Angeles, California, with her on the brief).

Before **EBEL**, Circuit Judge, **MCWILLIAMS**, Senior Circuit Judge, and **KELLY**, Circuit Judge.

PER CURIAM.

This case involves a challenge to the district court's sealing of three sets of documents in the Oklahoma City bombing trial: (1) defendant Terry Lynn Nichols' motion to suppress certain evidence, which motion was made available to the public only in redacted form, and exhibits attached to that motion; (2) Exhibit 72 filed in connection

with Nichols' motion to suppress, which consisted of FBI reports concerning Nichols' nine hour statement to authorities on April 21-22, 1995; and (3) motions for separate trials made by both Nichols and defendant Timothy James McVeigh, which were made available to the public only in redacted form, and attachments thereto. The Dallas Morning News, along with other representatives of the media known collectively as the Colorado-Oklahoma Trial Group and the Colorado-Oklahoma Print Media Group, objected to the sealing orders based on both the First Amendment and the common law right of access to the documents. We affirm the district court's orders.

I.

BACKGROUND

This case concerns an asserted right of press access to certain documents relating to the district court proceedings arising out of the bombing of the Murrah Federal Building in Oklahoma City, Oklahoma, on April 19, 1995. At the time this action was commenced, Timothy McVeigh had been accused of committing the bombing, which killed 168 people. McVeigh has subsequently been convicted and sentenced to death. McVeigh's co-defendant, Terry Nichols, who is accused of assisting McVeigh in his preparation for the bombing, is scheduled to go to trial following the conclusion of post-trial proceedings in the McVeigh matter.

On April 21, 1995, two days after the bombing, Nichols heard a news report that McVeigh was a suspect in the bombing. The report also mentioned Nichols as a

potential suspect. After hearing the report, Nichols, who lived in Herington, Kansas, drove to the local police station, identified himself, and asked to speak with someone regarding why his name was being mentioned in connection with the bombing investigation. From 3:00 p.m. that afternoon until just after midnight the next morning, law enforcement officers questioned Nichols regarding his relationship with McVeigh and his knowledge about the bombing. After the officers completed their questioning of Nichols, Nichols was arrested on a material witness warrant from the United States District Court in Oklahoma City.

The Oklahoma City bombing has been a matter of substantial public concern from the outset. In late 1995, after venue for the case had been transferred to Denver, and the United States District Court for the District of Colorado had assumed jurisdiction over the matter, the Dallas Morning News and the Colorado-Oklahoma Trial Group and the Colorado-Oklahoma Print Media Group (the "Media Representatives") filed motions seeking access to various sealed documents filed in the case, and requesting that procedures be established for the consideration of future challenges to the district court's decisions to seal documents and to close proceedings to the public. In an order dated January 24, 1996, the district court ruled on those motions. That order set forth the conditions under which documents would be sealed and articulated the standards under which media challenges to such decisions would be considered. *United States v. McVeigh*, 918 F.Supp. 1452 (D. Colo. 1996).

The January 24 order stated that the district court would consider five questions in determining whether to seal a document:

> (1) whether the matter involved activity within the tradition of free public access to information concerning criminal prosecutions;
>
> (2) whether public access might play a significant positive role in the activity and in the functioning of the process;
>
> (3) whether there was a substantial probability that some recognized interest of higher value than public access to information will be prejudiced or affected adversely by the disclosure;
>
> (4) whether the need for protection of that interest overrode the qualified First Amendment right of access; and
>
> (5) whether closure by the court was essential to protect that interest, considering all reasonable alternatives.

Id. at 1464.

This appeal concerns challenges to Judge Matsch's subsequent decisions sealing three separate sets of documents. The relevant documents are:

> (1) The redacted portions of Nichols' "Motion to Suppress Unlawfully Obtained Evidence," together with certain exhibits attached to that motion;
>
> (2) Notes taken by FBI Agent Stephen E. Smith during the initial interview of Nichols, which were referred to as "Government

Exhibit 72" ("Exhibit 72") during the hearings on Nichols' motion to suppress; and

(3) The redacted portions of McVeigh and Nichols' motions for severance, and the exhibits attached thereto.

The Media Representatives now seek review of the district court's orders sealing or redacting the various documents.[1] Appellants contend that the sealing orders[2] violate their First Amendment and common law rights of access to court documents. Appellants ask that we remand the case to the District Court with instructions either to unseal the documents or to make more detailed findings to justify keeping the documents under seal. The United States joins the Media Representatives in this request,[3] as do amici curiae The Reporters Committee for the Freedom of the Press, Newsday, and the Los Angeles Times, which have filed a joint amicus brief.

Both McVeigh and Nichols contend that the sealing orders should be upheld. McVeigh and Nichols argue that the sealing orders are justified by the extraordinary

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[1] Only *The News* has objected to the order redacting Nichols' motion to suppress and certain attached exhibits. That case is docket number 96-1409. Both *The News* and the other appellants objected to the orders sealing Exhibit 72 and redacting the severance documents, and that matter is docket number 96-1464.

[2] References to "sealing" material include the redacting of portions of documents that were produced in redacted form.

[3] It is Department of Justice policy to oppose any decision to seal documents unless specified criteria are met, such as where failure to seal the relevant documents will produce "[a] substantial likelihood of denial of the right of any person to a fair trial." 28 C.F.R. § 50.9(c)(6).

nature of the case and the interest in assuring their rights to fair trials. Further, McVeigh and Nichols contend that the orders were justified and adequately explained under the relevant First Amendment and common law standards.

II.

JURISDICTION AND STANDARDS OF REVIEW

First, we need to determine the basis of our jurisdiction to consider this appeal. The Media Representatives and the United States argue that jurisdiction over this appeal is available under the collateral order doctrine. 28 U.S.C. § 1291; *Cohen v. Beneficial Indus. Loan Corp*, 337 U.S. 541, 546 (1949). McVeigh and Nichols, on the other hand, argue that our jurisdiction is limited to mandamus consideration.[4]

The other circuits are fairly evenly split on this issue. Six circuits have concluded that press challenges to orders sealing documents in criminal cases are reviewable under the collateral order doctrine. *See In re New York*

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[4] In their reply brief, the Media Representatives agree that mandamus review would be appropriate in the event that we conclude there is no jurisdiction under the collateral order doctrine. Treating an asserted appeal as a petition for a writ of mandamus in this situation is appropriate if Appellants have standing and have complied with the substantive requirements of Fed. R.App. P. 21(a). *In re Washington Post*, 807 F.2d 383, 388 & n. 3 (4th Cir. 1986). There is no dispute concerning Appellants' standing, and all parties conceded at oral argument that there is no dispute as to whether Appellants complied with the requirements of Rule 21(a).

Times, 828 F.2d 110, 113 (2d Cir. 1987); *In re NBC, Inc.*, 828 F.2d 340, 343 (6th Cir. 1987); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983) (involving an underlying prisoner's civil suit rather than a criminal prosecution); *United States v. Dorfman*, 690 F.2d 1230, 1231-32 (7th Cir. 1982); *United States v. Cianfrani*, 573 F.2d 835, 845 (3d Cir. 1978); *United States v. Gurney*, 558 F.2d 1202, 1207 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). Four circuits have elected to review district court orders denying the press access to court documents through mandamus proceedings. *See Seattle Times Co. v. United States District Court*, 845 F.2d 1513, 1515 (9th Cir. 1988); *Washington Post*, 807 F.2d at 388, 393; *In re Globe Newspaper Co.*, 729 F.2d 47, 50 (1st Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 660 (8th Cir. 1992) (involving a contempt proceeding arising out of an underlying civil action). In any event, all circuits that have considered the issue have found appellate jurisdiction to consider the issue under one doctrine or the other.

In the Tenth Circuit, we have concluded that mandamus is the proper vehicle for the press to utilize in challenging bar orders directed toward trial participants when the press itself was not a party to the bar order. *Journal Publishing Co. v. Mecham*, 801 F.3d 1233, 1236 (10th Cir. 1986). We similarly conclude that mandamus is the proper vehicle for reviewing court orders sealing or redacting court documents in criminal proceedings. This circuit takes a "narrow[ ] view" of the applicability of the collateral order doctrine in criminal cases. *D & H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1445 (10th Cir. 1984) (en banc). Here, we note that the district

court apparently treated the media objections to its closure orders as mandamus actions. The January 24, 1996 order stated that the media organizations "are not . . . parties," and concluded that their "motions are more appropriately considered as a collateral or ancillary civil action in the nature of a petition for writ of mandamus. . . . " *McVeigh*, 918 F. Supp. at 1452. Finally, we observe that collateral order appellate review would be unusual in this situation, where the Media Representatives were not parties to the underlying proceeding and were not themselves directly enjoined by the sealing orders.

In determining whether to grant a writ of mandamus, we consider five 'nonconclusive guidelines':

(1) whether the petitioner seeking the writ has no other adequate means to secure the relief desired;

(2) whether the petitioning party will be damaged or prejudiced in a way not correctable on appeal;

(3) whether the district court's order constitutes an abuse of discretion;

(4) whether the court's order represents an often repeated error and manifests a persistent disregard of federal rules; and,

(5) whether the district court's order raises new and important problems or legal issues of first impression.

United States v. Roberts, 88 F.3d 872, 882-83 (10th Cir. 1996). The first and fifth factors are clearly applicable here. To the extent that the second factor asks only if

petitioners could adequately assert their claims on direct appeal, that factor is also satisfied, although we do not conclude that the petitioners are damaged or prejudiced in any legally cognizable way. The fourth factor, at least insofar as it requires a finding of persistent error and disregard for federal rules, is inextricably linked to the third factor of abuse of discretion. Thus, this case really boils down to whether the district court abused its discretion in sealing and redacting the documents here sought by petitioners. That requires an analysis of whether the documents are subject to the Media Representatives' First Amendment and common law rights of access, and whether the district court clearly violated a legal duty in its assessment of how those rights apply to the documents. Accordingly, we now turn to a consideration of the merits of the petition.

III.

ANALYSIS

The Media Representatives assert both a common law and a First Amendment right to access the unredacted documents at issue. It is clearly established that court documents are covered by a common law right of access. *Nixon v. Warner Communications*, 435 U.S. 589, 599 (1978). Under that doctrine, judicial documents are presumptively available to the public, but may be sealed if the right to access is outweighed by the interests favoring nondisclosure. *Nixon*, 435 U.S. at 602. Challenges to closure decisions based on the common law right of access are reviewed for abuse of discretion. *Nixon*, 435 U.S. at 599.

The Media Representatives further contend there is a First Amendment right of access to the documents. The First Amendment protects the right of the public and the press to attend criminal trials. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558-81 (1980) (plurality opinion). The Supreme Court has applied a qualified version of this First Amendment right to attend certain pre-trial proceedings in criminal cases which historically have been, and logically should be, open to the public, allowing access except where closure is essential to serve a higher interest and where closure is narrowly tailored. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-9 (1986) (*Press Enterprise II*) (recognizing right of access to preliminary hearings as conducted in California); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press Enterprise I*) (recognizing right of access to voir dire proceedings).

A number of circuits have concluded that the logic of *Press-Enterprise II* extends to at least some categories of court documents and records, such that the First Amendment balancing test there articulated should be applied before such qualifying documents and records can be sealed. It should be emphasized, however, that in not all of these cases did the court ultimately conclude that these records had to be made available to the public after the balancing test was applied. *See, e.g., Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (plea agreement – vacated order to seal because of inadequate justification and inadequate findings); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (affidavits accompanying search warrants – affirmed order to seal affidavits and revised order to

seal docket entries); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (plea agreement – affirmed order to seal even though district court findings were inadequate because record was sufficient to enable appellate court to conduct a balancing test); *In re NBC, Inc.*, 828 F.2d 340, 343-44 (6th Cir. 1987) (motions concerning recusal of trial judge and defense counsel conflict of interest – remanded for more adequate findings); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (suppression motions and accompanying exhibits – remanded for more adequate findings and for consideration of redacting sensitive material); *cf. Associated Press v. United States District Court*, 705 F.2d 1143, 1144 (9th Cir. 1983) (pre-*Press Enterprise II* case holding First Amendment prohibited blanket order sealing *all* documents filed in a high-profile criminal prosecution of John DeLorean, and remanding for document-by-document evaluation).

It is uncertain whether the Tenth Circuit would apply the First Amendment standards of *Press Enterprise II* or the common law standard of *Nixon* to a media request for access to court documents, where as here the press was present at the hearings involving those documents. Although we have held that there is at least a common law right of access to court documents, we have not previously decided, nor do we need to decide in this case, whether there is a First Amendment right to judicial documents. We have concluded that there is no "general" First Amendment right of access that extends to a law firm's commercially motivated request for the names and telephone numbers of persons charged with misdemeanor driving offenses. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994); *see also Matter of Search*

of 1638 E. 2d St., Tulsa, Okla., 993 F.2d 773 (10th Cir.) (applying a common law standard, but it is unclear whether a First Amendment argument was advanced in that case), *cert. denied*, 510 U.S. 870 (1993). In *United States v. Hickey*, 767 F.2d 705 (10th Cir. 1985), we observed that *Press Enterprise I* said nothing about the "constitutional dimensions, if any" of the right to access court documents, but rather it "deal[t] with the general issue of closed trial and pre-trial proceedings." *Id.* at 709. We further noted that *Nixon* remained "the only decision of the Supreme Court directly dealing with the more narrow issue of access to court files," and that in *Nixon* the Court did not recognize such a right under the facts of that case. *Hickey* was decided one year prior to *Press Enterprise II*. However, nothing in *Press Enterprise II* is inconsistent with what we said in *Hickey*, as *Press Enterprise II* also involved a closed proceeding and not sealed documents.

Of course, *Nixon* did not hold that there is no First Amendment right to access court documents. Rather, the Court there merely held that, in a situation where there "was no question of a truncated flow of information to the public," there was no right to physically access and copy the Watergate tapes that had already been played in open court where transcripts of the tapes were available to the media and the public generally. 435 U.S. at 609-10. Thus, that case did not address whether there was a First Amendment right to access to court documents when access to those documents is an important factor in understanding the nature of proceedings themselves and when access to the documents is supported both by experience and logic. There is not yet any definitive Supreme Court ruling on whether there is a constitutional right of

access to court documents and, if so, the scope of such a right. *See Lanphere*, 21 F.3d at 1512 (suggesting the possibility of using the First Amendment standard in those limited circumstances where experience and logic support public access to judicial documents).

In any event, in his January 24, 1996 Order, Judge Matsch concluded that the *Press Enterprise II* standard would apply to subsequent requests for access to sealed documents. 918 F. Supp. at 1463. Further, both the common law and First Amendment standards ultimately involve a balancing test, and the First Amendment right of access receives more protection than the common law right. Thus, if we find the district court orders satisfy the First Amendment standard, as we do, we will necessarily find that the orders satisfy the common law standard as well. Accordingly, for the purposes of this opinion, we assume without deciding that access to judicial documents is governed by the analysis articulated in *Press Enterprise II*.

IV.

APPLICATION

Assuming that the *Press Enterprise II* right of access extends to at least some types of judicial documents, the question remains whether that right applies to the *particular* types of documents at issue in this case. In determining whether a particular type of document is included within the First Amendment right of access, courts engage in a two-pronged inquiry in which they ask: (1) whether the document is one which has historically been open to inspection by the press and the public; and (2)

"whether public access plays a significant positive role in the functioning of the particular process in question." *Press Enterprise II*, 478 U.S. at 8-10. This two-part inquiry is referred to as the test of "experience and logic." *Press Enterprise II*, 478 U.S. at 9. If the qualified First Amendment right of access is found to apply to the documents under the "experience and logic" test, the district court may then seal the documents only if "closure is essential to preserve higher values and is necessary to serve that interest." *Press Enterprise I*, 464 U.S. at 510.

In evaluating the district court's orders regarding these particular documents, it is important to bear in mind the extraordinary context of this case as a whole. A high-profile case such as this imposes unique demands on the trial court, and requires the court to establish procedures for dealing effectively, efficiently and fairly with recurring issues such as whether documents should be placed under seal or redacted. The district court's January 24, 1996 order sought to establish such a proeedure. That order, which apparently has not been challenged, carefully discussed the relevant constitutional concerns, and the district court referred back to that order in its subsequent orders sealing the documents at issue here. Accordingly, the January 24 Order serves as an important backdrop to our consideration of this petition.

The documents at issue here include: (1) a motion to suppress, and its accompanying exhibits; (2) an exhibit apparently considered by the court for some purposes at Nichols' suppression hearing; and (3) motions to sever the Nichols and McVeigh trials together with accompanying exhibits. We consider each set of documents in turn.

A. The Suppression Motion Papers

Suppression motions have historically been open to inspection by the press and the public. The suppression hearing is a critical pre-trial proceeding, one which is often "as important as the trial itself." *Waller v. Georgia*, 467 U.S. 39, 46-48 (1984). Because the suppression hearing is the point in the process where the conduct of law enforcement officers is at issue, the public interest in access to a suppression hearing is particularly high. *Id.* Thus, the *Press Enterprise II* test of "experience and logic" suggests that the qualified right of access applies to the suppression motion.

However, the right of access to suppression hearings and accompanying motions does not extend to the evidence actually ruled inadmissible in such a hearing. *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977) ("[T]he press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain."); *In re Globe Newspaper Co.*, 729 F.2d 47, 54 (1st Cir. 1984) (stating that there is no constitutional right of access to inadmissible evidence); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("[T]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.") Neither tradition nor logic supports public access to inadmissible evidence. Access to inadmissible evidence is not necessary to understand the suppression hearing, so long as the public is able to understand the circumstances that gave rise to the decision to suppress. Moreover, suppressed evidence, by definition, will not be admissible at trial, and thus press access to such evidence will not play a significant

positive role in the functioning of the criminal process, as that evidence is simply irrelevant to the process. On the contrary, disclosure of such evidence would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that the law has determined may not be used to support a conviction.

Here, the district court has only sealed those portions of the motion and exhibits that contain materials, or excerpts from materials, ruled inadmissible in the McVeigh trial. Sealing these materials was necessary to protect the integrity of the order that the statements at issue constituted inadmissible hearsay or were otherwise inadmissible. Access to the redacted information is not needed for a full understanding of the court's decision on the motion to suppress, as the suppression hearing itself was open, and the court order provided a detailed outline of the reasons for its conclusion that the statements were inadmissible in the McVeigh trial. The court held a four-day long public suppression hearing, issued a publicly available order, and made available to the public redacted versions of the motions to suppress and attached exhibits. Thus, both the press and the public had ample opportunity to understand the circumstances surrounding Nichols' statements, and the reasons why those statements were deemed inadmissible against McVeigh. In conclusion, we believe the First Amendment right of access does not extend to the evidence actually suppressed in the suppression hearing, and the order sealing portions of the suppression motion and attached exhibits was consistent with any First Amendment or common law rights of access.

B. Exhibit 72

Similarly, access to Exhibit 72 is not supported by either tradition or logic. Exhibit 72 – the raw notes taken by Agent Smith during the Nichols interview – consists entirely of the hearsay statements that the district court concluded would not be admissible at the McVeigh trial. As was just discussed, there is no tradition of access to inadmissible evidence, and access to such information would not play a positive role in the functioning of the criminal process. Rather, access would have the deleterious effect of making publicly available incriminating evidence that the district court has ruled may not be considered in assessing the defendant's guilt. Moreover, through attending the public suppression hearing or reading the publicly available transcripts of that hearing, the press and public had ample opportunity to understand the general nature of and circumstances surrounding Exhibit 72, and the district court's rationale for ruling it inadmissible.

C. The Severance Documents

Again, we will assume without deciding that the First Amendment right of access applies to at least some portions of the severance documents, and will move on to apply the balancing test to the particular severance materials sealed in this case.

We believe the district court properly balanced First Amendment interests against the defendants' right to a fair trial in redacting the severance motions. At the severance stage, each defendant had a strong interest in shifting blame to the other, and in showing the court that their

defenses were mutually antagonistic. To make such a showing each defendant and his counsel had to discuss candidly his trial strategy and the strengths and weaknesses of his respective case. Granting general access to such documents would create a Hobson's choice between the need to obtain severance and the need to protect the client's interest in avoiding prejudicial pre-trial publicity. Although the redactions were substantial, the district court believed the redactions were necessary to avoid chilling the sort of candor needed to assess whether separate trials were necessary. *New York Times v. Biaggi*, 828 F.2d 110, 114 (2d Cir. 1987) ("The court, in applying the balancing test mandated by the First Amendment, should give added weight to fair trial and privacy interests where requiring disclosure will have a potential chilling effect on future movants.") Particularly in light of the abuse of discretion standard applicable to this mandamus action, we decline to second-guess the district court's conclusion on the record before us.

V.

DISTRICT COURT FINDINGS

We also believe that the district court made adequate findings to support its orders, and that it narrowly tailored those orders to the compelling interests at stake. With respect to those proceedings and documents to which the First Amendment right of access applies, sealing is only appropriate if the district court makes "specific, on the record findings demonstrating that 'closure is

essential to preserve higher values and is narrowly tailored to serve that interest.[sic] " *Press Enterprise II*, 478 U.S. at 13-14 (quoting *Press Enterprise I*, 464 U.S. at 510).

In this case, the district court made findings sufficient to support its sealing orders. With respect to the limited redactions of the suppression motion and accompanying exhibits,[5] the court noted that the motions contained "references and attachments which are not now and may never be in evidence," and that disclosure "would likely generate pre-trial publicity prejudicial to the interests of all parties in this criminal proceeding." Moreover, the court stated that its decision was based on the criteria set forth in its January 24 Order. The previous order set out the applicable constitutional standards, and discussed how those standards would be applied to sealing decisions throughout the case. *McVeigh*, 918 F. Supp. at 1464. These findings were adequate to "ensure that a reviewing court [could] determine whether the closure order was properly entered." *Press Enterprise I*, 464 U.S. at 510.

The district court also made adequate findings to support its redaction of the severance motion and exhibits attached thereto. In explaining its decision, the court again referred to the criteria set forth in the January

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[5] Because we concluded that the First Amendment right of access does not apply to Exhibit 72, or to those portions of the suppression motion and accompanying exhibits that consisted of the evidence actually suppressed, it was not necessary for the district court to make the specific balancing findings required in *Press Enterprise II* as to such materials.

24 Order. Moreover, the court expressed concern regarding the "chilling effect" that disclosure of these documents would have on the candor of defense counsel seeking separate trials, a rationale which we have concluded provided a sufficient basis for sealing the materials. Although the district court discussed its decision in terms of the "work product" doctrine, a doctrine which is likely inapplicable once the motions were submitted to the court, its discussion of its decision provides us with an adequate basis for reviewing the rationale for the decision.

Furthermore, we believe that the sealing orders were narrowly tailored to the compelling fair trial interests at stake. This is not a case where the district court has sealed entire documents or held closed pre-trial proceedings. Rather, the suppression and severance hearings were held in open court, and redacted versions of the documents at issue were made available to the public. Many of the other avenues often available to limit the prejudicial publicity that would arise from disclosure of these materials – such as a venue change, a continuance, extensive voir dire, and admonishments to the jury – had already been exhausted by the time the orders were entered or were ongoing processes utilized by the court to try to protect the defendants' right to a fair trial from the substantial publicity that was occurring. Further, we cannot say that the district court abused its discretion in electing not to sequester the jury during what was anticipated to be a several month long trial.

Finally, we have conducted an *in camera* review of the sealed and redacted material. Based on that review we conclude that the district court properly sealed only those

portions of the documents at issue necessary to protect, respectively, the integrity of suppressed evidence and the defendants' ability to argue effectively that separate trials were warranted. Furthermore, the court recognized that at some later point in the proceedings the balance of interests could change, and that further disclosures might be appropriate at such time. *Cf. Seattle Time Co. v. Rhinehart*, 467 U.S. 20, 31-34 (1984) (upholding protective orders protecting the confidentiality of discovery materials produced in pretrial discovery when the order does not restrict the dissemination of such information if later introduced at trial or otherwise obtained through means independent of the court's process). Consequently, we conclude that the substantial portions of the documents that were made publicly available have provided the press and the public with a constitutionally sufficient opportunity to understand the decisions at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. TIMOTHY JAMES MCVEIGH and TERRY LYNN NICHOLS, Defendants.	)	No. CR-95-110 MH (Filed Jan. 24, 1996)

MEMORANDUM OPINION AND ORDER ON MEDIA MOTIONS

MATSCH, District Judge*

Combined Communications Corporation of Oklahoma, Inc. (KOCO-TV), the Dallas Morning News, Capital Cities/ABC, Inc., CBS, Inc., Fox News, Inc., National Broadcasting Co., Inc., Cable News Network, Inc., the Chronicle Publishing Company (d/b/a The San Francisco Chronicle), the New York Times Company, Philadelphia Newspapers, Inc. (d/b/a the Philadelphia Inquirer and the Philadelphia Daily News), Seattle Times Co., The Washington Post, and Time Inc. (collectively "National Media Group"), FOI Oklahoma, Inc., The Associated Press, The Daily Oklahoman, The Tulsa World, KFOR-TV Channel 4, KWTV Channel 9, KJRH Channel 2 (Tulsa),

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*Chief Judge Richard P. Matsch, District of Colorado, sitting by designation.

Society of Professional Journalists Oklahoma City Chapter and Society of Professional Journalists Eastern Oklahoma Chapter (collectively "Media Group"), have filed motions asking that documents filed in this case under seal be unsealed where appropriate, that the clerk be directed to provide public access to a complete copy of the docket sheets and that procedures be established for consideration of future requests that documents be sealed or proceedings be closed to the public.

These motions were accepted for filing in this case even though the movants are not parties to the proceeding. The government and each of the defendants have filed responses to these motions and oral arguments were heard on December 13, 1995. The motions raise important questions under the First, Fifth and Sixth Amendments to the United States Constitution. The movants have standing to present these questions on behalf of themselves and the general public. They are not, however, parties to this criminal proceeding and the motions are more appropriately considered as a collateral or ancillary civil action in the nature of a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. §1361, directed to the clerk of this district court.

There are fundamental values served by publicity in the administration of criminal justice. Chief Justice Burger articulated them as follows:

> The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the

concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.' "

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward

> may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," and the appearance of justice can best be provided by allowing people to observe it.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570-572 (1980) (citations omitted). Those words aptly describe the reasons for news media interest in this case and the frustration reflected in the subject motions. The docket sheets reveal a routine practice of sealing documents without adequate recognition of the public interest in obtaining information concerning the progress of this criminal proceeding. Many entries give only a data base number with the phrase "Sealed (In vault)" without any identification of the source of the document, the nature of it, the reason for not including it in the case file or who directed or authorized such secrecy. Some limited identification of the nature and source of some of the documents has been provided by attorneys in complying with directions from Magistrate Judge Howland. A summary was submitted by the movants in their status report filed on October 27, 1995. Several hundred documents have been sealed. Many more papers of the same or similar kind will be submitted as the case progresses. The court must now establish standards for a system of records control to evaluate claims for secrecy and for the exercise of the discretionary authority to restrict public access to information.

A review of first principles will assist in identifying useful criteria for balancing the conflicting interests at each stage of the proceeding. This analysis will permit classification of individual items within a system of presumptions.

Every criminal prosecution in a federal court begins with some investigation by one or more law enforcement agencies of government to develop an evidentiary base for the necessary showing of probable cause. The documents generated during the investigation and the conduct of the investigators are largely shielded from public view. Specific privileges to withhold information, for example, the informer's privilege, have been recognized. *Matter of Search of 1628 E. 2nd St., Tulsa, Okl.*, 993 F.2d 773, 774 (10th Cir. 1993). Preserving the integrity of the factual inquiries, encouragement of people to come forward with information, avoidance of flight and destruction of evidence and protection of the reputations of innocent people are among the reasons given in support of such secrecy. These same reasons have been expressed in support of the policy of grand jury secrecy, discussed later.

Records of all agencies of government have historically been open to public inspection under the common law of this country. *See, e.g., McCoy v. Providence Journal Co.*, 190 F.2d 780, 785-86 (1st Cir.), *cert. denied*, 342 U.S. 894 (1951). That principle is consistent with the basic premise of democracy – that government is the servant of the people.

In 1974, Congress enacted the Freedom of Information Act, ("Act") P.L. 93-502, now appearing in 5 U.S.C.A. §552. The premise of the Act is that records of all agencies

of the executive branch of the federal government should be open to public view. The importance of the legislation was succinctly stated in the following paragraph from House Report No. 1497:

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests.

H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 6, *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423. Congress excepted law enforcement agency records from the policy of openness. Section (b)(7) of 5 U.S.C. §552 denies public access to the following records and information:

> (7) records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or

> information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

Executive branch agencies are also authorized to exclude information by section (c)(1) of the Act, as follows:

> (c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and –
>
> > (A) the investigation or proceeding involves a possible violation of criminal law; and
> >
> > (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,
>
> the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

A law enforcement agency may seek assistance from the court during the investigation while it is still secret. If the statutory criteria are met, investigators may obtain

orders authorizing the interception of wire, oral or electronic communications following the procedure prescribed in 18 U.S.C. §2518. Subsection (8)(b) of §2518 directs that such applications and orders shall be sealed by the judge and custody of them "shall be wherever the judge directs." The statute specifically mandates that the applications and orders for interceptions shall be disclosed "only upon a showing of good cause before a judge of competent jurisdiction."

Search warrants may be issued under Rule 41 of the Federal Rules of Criminal Procedure from a federal magistrate judge or a state judge upon request of a federal law enforcement officer or a government attorney. Return of the search warrant with an inventory of the property taken is to a federal magistrate judge who shall file them with the clerk of the district court. These are public records at that time.

Ultimately the results of the investigation are presented to a grand jury, unless the defendant waives indictment. Historically, grand jury proceedings have been secret. In 1944, Rule 6 of the Federal Rules of Criminal Procedure was adopted and grand jury secrecy was formalized. The Supreme Court summarized the policy predicates for grand jury secrecy in *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 219 (1979):

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they

> would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Proceedings before the grand jury are recorded but the recordings or reporter's notes and transcripts remain in the custody or control of the government's attorneys. Fed. R. Crim. P. 6(e)(1). Grand jurors, interpreters, stenographers, typists and government attorneys are prohibited from disclosing matters occurring before the grand jury, except as provided in Fed. R. Crim. P. 6(e)(3). Courts may order disclosure on *ex parte* petitions by the government and upon such notice as the court may direct upon petitions by others. Fed. R. Crim. P. 6(e)(3)(C). Court hearings on matters affecting a grand jury must be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. Fed. R. Crim. P. 6(e)(5). Records, orders and subpoenas relating to grand jury proceedings are required to be kept under seal "to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury." Fed. Rule. Crim. P. 6(e)(6).

Secrecy continues even after indictment and courts have no authority to review a grand jury's probable cause finding. *Costello v. United States*, 350 U.S. 359, 363 (1956), or to dismiss because of misconduct by attorneys or witnesses except in extraordinary circumstances. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). Even government counsel are excluded from the room during

grand jury deliberations. In short, a federal grand jury's proceedings are shrouded in nearly absolute secrecy.

The appearance of a defendant in response to a criminal complaint, an indictment, or an information begins the adversary process directed towards determining the sufficiency of the government's evidence to establish the factual elements of the charged offense beyond a reasonable doubt. That determination is ordinarily made by a jury after a public trial, as required by the Sixth Amendment, conducted according to procedures and limitations assuring fundamental fairness within the guarantee of due process of law in the Fifth Amendment.

Although the Sixth Amendment protects the right of the accused to a public trial, it has long been clear that the public and the press also have a right to attend criminal trials. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). No integral part of the trial, including jury selection, can be closed to the public. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) (*"Press-Enterprise I"*). That right extends to a preliminary hearing. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-9 (1986) (*"Press-Enterprise II"*).

Other types of hearings may be held before trial, depending upon the complexity of the case. Motions under Fed. R. Crim. P. 12(b) frequently require the taking of evidence and hearings on such motions are normally part of the public process of adjudication.

Preparation for the defense of those accused of criminal conduct roughly parallels the government's precharge investigation. The defendant may obtain discovery and inspection of government information under Fed.

R. Crim. P. 16. Defense counsel must go well beyond such discovery. The advocate for the accused has both an ethical obligation and a constitutional duty to conduct a thorough factual investigation and legal analysis. *See* ABA, Standards for Criminal Justice, Standard 4-4.1 and Commentary. In capital cases, that duty includes preparation for a possible penalty phase of trial. Inadequate defense investigation, including the failure to investigate all plausible lines of defense, constitutes ineffective representation requiring reversal of a conviction on constitutional grounds. *Osborn v. Shillinger*, 861 F.2d 612, 627 (10th Cir. 1988). The focus of a defense lawyer's efforts is to assess the ability of the prosecution to establish guilt under the law and within the rules of evidence and procedure – not guilt in any moral or ethical sense. ABA Standards for Criminal Justice, Standard 4-4.1 and Commentary at 4.54-4.55.

The lawyers themselves are subject to requirements of confidentiality during this period of preparation for trial. The attorney-client privilege and the work product doctrine protect some information from opposing counsel. The Department of Justice has used its rule-making authority to restrict public release of information in 28 C.F.R. – §50.2. Professional ethics applicable to advocates as officers of the court limit what all counsel may reveal publicly. Local Rule 27 in this district sets out the general guidelines. It recognizes the authority of the court to impose additional limitations. These provisions are necessary to assure the fairness of the proceedings and to emphasize that trials are conducted inside the courtroom under the supervision of the presiding judge rather than on the courthouse steps. The news media and the public

are spectators, not participants, in the process of adjudication.

Apart from the requirements of reciprocal disclosure to government counsel in Fed. R. Crim. P. 16(b), the investigation and trial preparation by defense counsel are conducted secretly. If the defendant has adequate financial resources, the only court involvement is to conduct hearings to assist the defense in obtaining access to information and evidence on motions and applications pursuant to the rules of criminal procedure.

A defendant unable to pay for his defense is in very different circumstances. He must rely on the court's authority under the Criminal Justice Act, 18 U.S.C. §3006A, for payment for counsel, investigators, experts and any other services necessary for adequate representation pursuant to plans approved by the judicial council of each circuit under the supervision of the Director of the Administrative Office of the United States Courts within guidelines promulgated by the Judicial Conference of the United States.

Those guidelines require the use of prescribed forms for appointment of counsel, for authorization and payment for services other than counsel and for compensation of those providing services within the limitations established by the Judicial Conference. *See* VII Administrative Office of the United States Courts, *Guide to Judiciary Policies and Procedures,* Chaps. I-V. Case compensation maximum amounts may be waived and payments in excess of statutory limits may be made only with approval of the chief judge of the circuit or an active circuit judge to whom such authority has been delegated.

Such excess payments require a finding that the case is "extended or complex," and fair compensation is determined by use of the criteria set out in the following paragraph:

> After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The following criteria, among others, may be useful in this regard: responsibilities involved measured by the magnitude and importance of the case; manner in which duties were performed; knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel; nature of counsel's practice and injury thereto; any extraordinary pressure of time or other factors under which services were rendered; and any other circumstances relevant and material to a determination of a fair and reasonable fee.

Id. at Chap. II, Part C, §2.22B(3).

The guidelines provide for secrecy in seeking authority for obtaining services other than counsel in the following paragraph:

> *Ex parte* applications for services other than counsel under subsection (e) shall be heard *in camera,* and shall not be revealed without the consent of the defendant. The application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense. Appointed counsel shall not be required to submit evidence of a prior

> attempt to enter into a stipulation with the United States Attorney as a prerequisite to obtaining services under subsection (e). The court may encourage counsel to enter into stipulations, in the interest of expedition and economy, without, however, disclosing the contents or otherwise compromising the secret nature of the *ex parte* application.

Id. at Chap. III, Part A, §3.03.

Chapter V of the Administrative Office guidelines regarding appointment of counsel contains the following section concerning release of information:

> *Procedures for the Release of Information Pertaining to Criminal Justice Act Activities.* Neither the Freedom of Information Act (5 U.S.C. §552) nor the Privacy Act (5 U.S.C. §552a) applies to the Judiciary and neither is applicable to requests for release to the public of records and information pertaining to Criminal Justice Act activities.
>
> Generally, such information which is not otherwise routinely available to the public should be made available unless it is classified pursuant to an executive order or its release might adversely affect the national defense or foreign policy interests of the United States, unduly intrude upon the privacy of attorneys or defendants or compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources (see 5 U.S.C. §552(b)).
>
> Upon request, or upon the court's own motion, documents pertaining to Criminal Justice Act activities maintained in the clerk's open files,

> which are generally available to the public, may be judicially placed under seal or otherwise safeguarded until after all judicial proceedings in the case are completed and for such time thereafter as the court deems appropriate. Interested parties should be notified of any modification of such an order.
>
> Requests for release of information pertaining to Criminal Justice Act activities in the custody of the Administrative Office will be disposed of in accordance with internal directives of that office.

Id. at Chap. V, §5.01. It is noteworthy that this section makes reference to 5 U.S.C. §552(b), containing the exceptions for public disclosure of law enforcement agency records.

Congress has recognized the special nature of offenses punishable by death. A very old statute, with amendments, now found at 18 U.S.C. §3005 provides:

> Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours. In assigning counsel under this section, the court shall consider the recommendations of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts. The defendant shall be allowed, in his defense to make any proof that

> he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.

In enacting the Anti-Drug Abuse Act of 1988, Congress extended the death penalty to persons engaging in a "continuing criminal enterprise" when any intentional killing results, and in Title VII of the enactment, provided for full support for defense services in all capital cases. The operative language appears at 21 U.S.C. §848(q) as follows:

> (9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.
>
> (10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be

reasonably necessary to carry out the requirements of paragraphs (4) through (9).

Authorization for payment of attorneys' fees and for support services for the defense of an indigent person accused of a capital offense must be obtained from the district judge assigned to the case. Appointed counsel file applications explaining the need for the services requested in much the same manner as in cases under the Criminal Justice Act although the statutory and guideline limitations for other felony cases are not applicable.

The Judicial Conference promulgated separate guidelines for representation in death penalty cases. *See* VII Administrative Office of the United States Courts, *Guide to Judiciary Policies and Procedures,* Chap. VI. Section 6.02A provides as follows:

> *Inapplicability of CJA Hourly Rates and Compensation Maximums.* In accordance with section 848(q)(10) of title 21, U.S.C., an attorney appointed to represent a defendant charged with a federal capital crime or seeking to vacate or set aside a death sentence in a proceeding under section 2254 or 2255 of title 28, U.S.C., shall be compensated at a rate and in an amount determined exclusively by the presiding judicial officer to be reasonably necessary to obtain qualified counsel to represent the defendant, without regard to CJA hourly rates or compensation maximums. Unlike appointments in non-capital cases under the CJA, there is no provision for review and approval by the chief judge of the circuit in federal capital prosecutions or in death penalty federal habeas corpus proceedings.

Similarly, the CJA limitations for compensation for investigative, expert and other services are made inapplicable in section 6.03B. Special forms, different from the CJA vouchers, are used in submitting *ex parte* requests for payment in death penalty cases. These forms, identified as CJA Form 30 for compensation to counsel and CJA Form 31 for expert and other services, require detailed descriptions of services performed including the time spent and dates of service.

In reviewing these applications, the court must rely on the experience and integrity of defense counsel, who have a duty to guard against improperly influencing the court in these *ex parte* communications and to protect privileged information. There are no "probable cause" or other standards to apply as with *ex parte* submissions by government counsel when court orders are necessary during the pre-charge investigation.

Authorization for expenditures of public funds to assist in preparation of a defense is not the traditional work of judges. There is no adversary to challenge the request and there is no evidentiary context within which the reasonableness of it may be evaluated. The more complex the case, the greater the difficulty. The judge as gatekeeper for the fisc has a ministerial duty to exercise restraint while the judge as protector of the due process necessary for a fair trial must indulge the defense all benefit of every doubt.

The denial of a request for expert or other services may result in the reversal of a conviction. *See, e.g., United States v. Crews*, 781 F.2d 826, 833-834 (10th Cir. 1986)

(conviction reversed where court failed to appoint defendant a psychiatrist to aid in the defense). There is what may be called a right of "foundational fairness" requiring financial support for assigned counsel in preparing a defense just as there is the requirement of fundamental fairness limiting the manner of the prosecution of criminal charges in federal courts.

Because of the uncertainties involved, these authorizations and interim payments are reviewed periodically during the pendency of a case. Authorizations and awards during the progress of the case are not final judgments. *See United States v. Davis*, 953 F.2d 1482, 1498 n.21 (10th Cir. 1992) ("Fee determinations by the district judge pursuant to the Criminal Justice Act are administrative in character and do not constitute final appealable orders within the meaning of 28 U.S.C. §1291.").

Papers filed with the court, records of court activity, exhibits received at hearings and trials and orders and judgments entered by the court are all records normally accessible by the press and public. The Supreme Court included such records within the general common law right to inspect and copy public records and documents in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). The Court also held that this common law right was subject to the supervisory power of each court to limit access to protect other interests and said that the decision as to access is "one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599. In its holding the Supreme Court affirmed a district court order denying the copying of tapes received in evidence.

The Freedom of Information Act applies to executive branch agencies, not the courts. The Supreme Court has commented on the contours of the public's right of access to judicial records in several cases. In *Press-Enterprise II*, the Supreme Court reversed a decision denying public release of the transcript of a closed preliminary hearing in a California murder case because the state court denied the existence of any First Amendment right of access and found justification for the secrecy by a showing of "a reasonable likelihood of substantial prejudice" to the defendant's right to a fair trial. *Press-Enterprise II*, 478 U.S. at 6-7. Writing for the majority, and citing *Waller v. Georgia*, 467 U.S. 39 (1984), Chief Justice Burger observed that opening the process to neutral observers was an important means of assuring fairness. *Press-Enterprise II*, 478 U.S. at 7. In *Waller v. Georgia*, 467 U.S. 39 (1984), the Court agreed with the defendant that the Sixth Amendment and the historical tradition of accessibility recited in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), required that a hearing on a motion to suppress evidence be open. In *Press-Enterprise II*, Chief Justice Burger then quoted the language from *Press-Enterprise I* that openness in criminal trials "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise II*, 478 U.S. at 9 (quoting *Press-Enterprise I*, 464 U.S. at 501). The Chief Justice referred to the importance of secrecy in grand jury proceedings and articulated an "experience and logic" test in the following paragraph:

> These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute. *Globe Newspaper Co. v. Superior Court, supra,* at 606. While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity. In such cases, the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access. In *Press-Enterprise I* we stated:
>
> > [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.
>
> 478 U.S. at 9 (citation omitted).

The reach of the ruling in *Press-Enterprise II* can be measured by careful consideration of the dissenting opinion of Justice Stevens, joined by Justice Rehnquist. Justice Stevens observed that the First Amendment right involved was not the right to communicate information but the right to acquire it. 478 U.S. at 18 (Stevens, J., dissenting). A prior restraint on publication by the press

can be valid only upon proof of a compelling governmental interest with any restriction narrowly tailored to serve that interest. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 556-570 (1976). The First Amendment right of public access to court proceedings is *qualified* and may be overridden when closure is essential to preserve higher values and is narrowly tailored to serve that interest. Restrictions on the right of access are not limited to protections of the defendant from prejudicial pre-trial publicity. As noted in footnote 2 of the Court's opinion in *Press-Enterprise II*, the interests of persons other than the accused may require protection as, for example, the protection of victims of sex crimes in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-610 (1982). *Press-Enterprise II*, 478 U.S. at 9 n.2.

The movants have cited several cases from circuit courts of appeals with the suggestion that in every case of sealing or closure (1) the proponent must establish a "compelling" competing interest that outweighs the First Amendment right of access; (2) the limited access must be both necessary and effective in protecting that interest and (3) the limitation adopted must be the least restrictive means available.

That suggested method of analysis is both an overstatement of the qualified right of access and an oversimplification of the manner of its application. As previously observed, the interests to be protected are not limited to the protections of the right of the accused to a fair trial. The timing of the disclosure is also a significant factor in the balancing of the affected interest. The stage of the proceeding may determine the question of access.

Some appellate courts have sought to distinguish the common law principle of openness from the qualified First Amendment right of access. For purposes of this opinion, they are conflated and the standards to be applied are those articulated in *Press-Enterprise II*.

The media motions to open sealed documents will be determined by the answers to these questions: Does the matter involve activity within the tradition of free public access to information concerning criminal prosecutions? Will public access play a significant positive role in the activity and in the functioning of the process? Is there a *substantial probability* that some recognized interest of higher value than public access to information will be prejudiced or affected adversely by the disclosure? Does the need for protection of that interest override the qualified First Amendment right of access? Is the closure by the court essential to protect that interest, considering all reasonable alternatives? This same analysis will also be used in considering any future motions to seal.

The present focus of attention is on documents generated in activities not directly related to the process of adjudication. Accordingly, they are not within the strong presumption of open access to proceedings in court. Historically, some types of court documents have been kept secret for important policy reasons. They include presentence reports. *United States v. Corbitt*, 879 F.2d 224 (7th Cir. 1989), *cited with approval in Matter of Search of 1638 E. 2nd St., Tulsa, Okl.*, 993 F.2d 773, 775 (10th Cir. 1993). *See also Times-Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989) (search warrants and supporting affidavits).

The majority of the documents under seal in the clerk's office are applications and orders for payment of interim fees and support services for defense attorneys under 21 U.S.C. §848q(9) and (10). The court has provided funding for an extensive factual investigation, including extensive travel for interviews of persons who may have relevant information. Authority to retain experts for consultation in a wide ranging variety of disciplines has been granted. The defendants' lawyers have vigorously pursued their duty to investigate. Some sense of the magnitude of the task involved in the defense investigation is provided by the statement of government counsel, in discussing a discovery schedule, that there are more than 10,000 FBI interview reports available for inspection by the defense.

Media counsel have shown their sensitivity to the secrecy required for the defense investigation and trial preparation by restricting their requests to the amounts paid out to the attorneys and others providing services to the defense. There is no tradition of public access to that information while the investigation and preparation for trial are in progress. To the contrary, the requests must be submitted *ex parte* and *in camera* to keep privileged information from the prosecution. Disclosures to the public would, of course, become known to government counsel. In *United States v. Suarez*, 880 F.2d 626 (2nd Cir. 1989), the Second Circuit Court of Appeals affirmed an order of a district court releasing to the news media the amounts of CJA payments. There, the request was made after jury selection and while the trial was in progress. The case was a felony prosecution not involving the death penalty. The same policy considerations were not present at that

stage of the proceedings and the case did not have the heightened sensitivity of this case.

There is no doubt that the cost of the legal defense paid for from public funds for each of the defendants in this case will become public information at some time. The question is when. Media counsel argue that the public is interested in the amount spent for the defense during the course of the case because the funds are public and the taxpayers may question both the reasonableness and the appropriateness of the expenditures. The legitimacy of those interests is unquestioned. Yet, there are important interests to be protected before the entry of final judgments in this case.

The movants concede that disclosing the services performed and the reason for them would inappropriately reveal the defendants' investigations and strategies. All of the reasons supporting grand jury secrecy are equally applicable to the pre-trial preparation of the defense of capital charges. This includes the protection of people from public speculation about their possible involvement in the criminal conduct at issue. That is particularly important in this case given the horrendous destruction of life and property from the bombing of a building housing government agencies, the widespread publicity and the prolixity of punditry about the identity and motivation of possible perpetrators.

An additional interest is the protection of appointed counsel from vilification and accusations of improper motivations in the conduct of their responsibilities in the

representation of these defendants. Because of the inhibitions imposed upon them by their professional responsibilities, these lawyers are unable to respond to such accusations or to make public explanations of their conduct. Moreover, any "robust debate" about expenditures for the defense of the accused at this stage would be counter-productive to the process of adjudication by diverting counsel from proceeding with the task of preparing for trial. The interests adversely affected by disclosure now are the effectiveness of defense counsel and fairness of the trial process.

Revealing only the amounts of interim payments is not a reasonable alternative to full disclosure. It would distort the public perception about the fairness of the process because the expenditures, out of context, would emphasize costs without any information about benefits obtained. Public access to these cost figures would be detrimental, not helpful, to the functioning of the court at this stage of the proceeding.

Accordingly, this court finds and concludes that the request for the amounts of expenditures made for defense services before trial must be denied for the protection of the interests identified in this opinion. All documents submitted in connection with approval for and payment of services under 21 U.S.C. §848(q) shall be marked "§848(q) documents" with the name of the defendant involved and shall remain sealed until the entry of final judgments concluding these proceedings as to both defendants in the trial court. Future filings of documents of this type will be so marked and sealed.

Another category of sealed documents involves the issuance of subpoenas for production of documents under Fed. R. Crim. P. 17(c). Ordinarily subpoenas for court hearings are issued in blank by the clerk of the court at the request of counsel. Fed. R. Crim. P. 17(a). There is no file record made of this process. When requested by counsel for an indigent defendant, the court will order the issuance of the subpoena upon an *ex parte* application "upon a satisfactory showing that the presence of the witness is necessary to an adequate defense." Fed. R. Crim. P. 17(b). These applications and orders are routinely sealed to protect them from disclosure to the government before trial.

Rule 17(c) of the Federal Rules of Criminal Procedure provides for production of books, papers, documents or other objects designated in a subpoena, before the court prior to trial or prior to the time they are offered in evidence. The court may authorize inspection by the parties and their attorneys upon their production. Orders for such production before trial depend upon a showing that the items to be produced are: (1) evidentiary and relevant; (2) not otherwise procurable before trial by the exercise of due diligence; and (3) so necessary for trial preparation that the failure to obtain such inspection may tend to delay the trial unreasonably. The application must be made in good faith and not merely for discovery. *United States v. Nixon*, 418 U.S. 683, 699-700 (1974).

A sampling of the sealed papers in this category shows that they have been routinely sealed without due regard for any particular need for secrecy. Thus an order was entered under seal on July 31, 1995, directing service of a Rule 17(c) subpoena "together with a copy of the

Motion" to identify the items to be returned to the clerk by mail. Disclosure of the motion to the person or entity being served appears to be inconsistent with any legitimate need for secrecy. There are other orders for subpoenas for production of information which do not appear to involve any need for secrecy between the parties. Indeed, counsel have agreed upon disclosure of the orders to each other under some circumstances. Presumably there is no need to deny public access to the orders for production. The material produced, however, will be kept from public view under the guidance given in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

No categorical order can be entered on the status of these Rule 17(c) applications and orders. If any party wants to continue to keep the applications and orders secret, they must file a motion setting forth the reasons under the analysis articulated above.

The government in response to the media motions identified papers filed in magistrate judge proceedings concerning material witnesses. These are numbers M-95-94-H, M-95-102-H and M-95-103-H. These documents have been and will continue to be sealed because they are within the tradition of secrecy and there is no reasonable alternative to denial of any public disclosure of them at this time.

Documents numbered 127, 130, 131, 132 and 133 concern motions and orders relating to the conditions of confinement of one of the defendants at FCI, El Reno, and entry 143 is a sealed transcript of an *in camera* hearing held by Chief Judge David Russell. For the reasons stated in the order setting the *in camera* hearing and on the

record at the conclusion of the hearing, Judge Russell sealed the transcript of the hearing and pertinent documents. It is sufficient to say that those reasons meet the criteria for secrecy established in this opinion. The principal justification for sealing is the necessity to protect confidence in an attorney-client relationship.

There may be records sealed to protect the privacy interests of the defendants in custody, such as matters relating to physical or mental health. They should be identified by the phrase "privacy rights of the defendant in custody." Upon such identification they will remain sealed unless there is a challenge to such classification and in that event further inquiry may be necessary.

There is a misperception about the existence of a "non-public docket." The clerk's office prepares all docket entries pursuant to a computer program called the Integrated Case Management System (ICMS). Any corrections or changes in docket entries are made through a "utility program" which is referred to as the "non-public" docket. All documents in the custody of the clerk have an ICMS number in the public docket. There is no dual-docketing or "two-tiered" system of docketing as prohibited in *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993).

Entries Nos. 362, 368 and 371 are proposed questionnaires for possible use in selection of jurors. There is no dispute that the documents will remain sealed. Indeed, they are clearly premature and probably moot since the reassignment of this case.

Some documents have been unsealed by orders entered by Magistrate Judge Howland by agreement of the parties.

There has been no *in camera* review by me of the documents now under seal and I do not expect to undertake such a task. The lawyers for the parties in this case will now be responsible for review of the past practices to determine what further action need be taken to identify the categories of papers under seal and proceed under the presumptions established in this opinion.

Upon the foregoing, it is now ORDERED as follows:

1. All applications and orders for payment of interim fees and support services for defense attorneys under 21 U.S.C. §848(q)(9) and (10) shall remain sealed until the entry of final judgments as to both defendants. On all future filings in this category, the clerk shall record with the number of each entry the type of application, for example, "§848(q) application for interim fees for counsel," "application for travel," etc. and the name of the defendant on whose behalf the application has been submitted. Entries of orders shall refer back to the ICMS number of the application. If any *ex parte, in camera* hearing is necessary to evaluate an application under §848(q), a tape recording or transcript of that hearing will be kept under seal in a separate file. The docket entry for the application will include a reference to the date of such a hearing and the persons present.

2. No other documents will be sealed automatically. All applications and orders for production of documents and other things pursuant to Fed. R. Crim. P. 17(c) now on file will be opened for public inspection on Monday,

March 4, 1996, unless any party to this criminal proceeding files before that date a motion to seal particular documents or parts thereof for reasons believed to be adequate within the standards established in this opinion. Any objections to such motions must be filed on or before March 11, 1996.

3. Any party seeking an order of secrecy for any documents other than those identified in paragraphs 1 and 2 above, must submit a motion for entry of a sealing order consistent with the analysis articulated in this opinion. The motions will be placed in the case file and will be open to public inspection. The proposed filing will be submitted under seal until the motion to seal is ruled upon. No sealing order will enter for at least three business days after the filing of the motion to seal, except in emergency circumstances shown or referred to in the motion. Any objections filed within those three business days will be considered by the court.

4. On the day following the filing of a motion to close all or any part of an adversary hearing or court proceeding, a notice will be displayed in the clerk's office advising of such motion and informing that any person or entity may file objections to the motion on or before the date set forth in such public notice, which date will be not less than three business days from the date of posting the notice. The motion and any objections will be heard in open court.

DATED at Denver, Colorado, on January 24, 1996.

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch
United States District Judge
sitting by designation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Criminal Action No. 96-CR-68-M

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY JAMES MCVEIGH and
TERRY LYNN NICHOLS,

Defendants.

MEMORANDUM OPINION AND ORDER ON
MOTIONS TO SUPPRESS EVIDENCE AND
REGARDING ADMISSIBILITY OF STATEMENTS
OF TERRY LYNN NICHOLS

(Filed Aug. 14, 1996)

MATSCH, Chief Judge

This Memorandum Opinion and Order addresses motions to suppress evidence filed by defendant Terry Nichols as docket entry no. 1453 and by defendant Timothy McVeigh as docket entry no. 1457. Redacted versions of these same motions appear in the public record under docket entries 1452 and 1455. Also addressed is a motion in limine regarding statements of Terry Nichols filed by the United States as docket entry no. 1003.

The complete motions remain sealed because they include references and attachments describing facts which are not now and may never be in evidence, and the

court considers them to be properly sealed under the criteria set forth in the Memorandum Opinion and Order on Media Motions, entered January 24, 1996. If that material were now made public, it would likely generate pretrial publicity prejudicial to the interests of all parties in this criminal proceeding. The bases for the rulings are fully disclosed in this memorandum opinion.

After initial briefing, the court held a hearing on June 18, 1996. At that hearing, counsel for Timothy McVeigh made offers of proof addressing his motion challenging the following search warrants: (1) a search warrant issued by Magistrate Judge Ronald Howland on April 21, 1995, at 3:55 p.m. for the search of Timothy McVeigh's property in custody at the Noble County Jail in Perry, Oklahoma; (2) a search warrant issued by Chief Judge David Russell on April 21, 1995, at 3:10 p.m. for the search of a Mercury Marquis automobile that had been driven by Timothy McVeigh; (3) a search warrant issued by Magistrate Judge Howland on April 21, 1995, at 5:55 p.m. for taking hair samples from the person of Timothy McVeigh; and (4) a search warrant issued by Magistrate Judge Morton Sitver on April 23, 1995, at 5:23 p.m. for a search of box number 206 at the Mail Room, in Kingman, Arizona. Mr. McVeigh challenged those search warrants on the ground that the affidavits filed in support of them, signed by FBI agent Henry Gibbons, contained false and misleading information and that under *Franks v. Delaware*, 438 U.S. 154 (1978), the court should find that the FBI provided such information to the issuing judicial officers knowingly or with reckless disregard for the truth of the information and that the challenged information was necessary to finding probable cause for issuing each of these warrants.

This court ruled at the June 18, 1996, hearing that the defendant's proffer of facts was not sufficient for an evidentiary hearing under the *Franks v. Delaware* case. The court also made an oral ruling that the information in an additional proffer, challenging the search warrants on the ground that Chief Judge Russell and Magistrate Judge Howland were not capable of giving neutral and objective consideration to the affidavits, because of their personal experiences, was insufficient to support the contention, and that no evidentiary hearing was required. Those oral rulings are now incorporated into this memorandum opinion and order by this reference.

The other motions to suppress were the subject of a four-day evidentiary hearing and post-hearing submission of proposed findings of fact and conclusions of law. Upon a review of all of this material, the court now makes its findings and conclusions in the form of this memorandum opinion. Because the rulings on the legal issues raised are, in large part, driven by the facts, some of which are in dispute because of contradictory evidence, the court first sets forth the following findings as the facts which are relevant and material to the issues presented by the record.

At 9:02 a.m. on Wednesday, April 19, 1995, an explosion destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 people, injuring hundreds more and capturing the attention of the entire nation. The Federal Bureau of Investigation and other federal law enforcement agencies immediately began a massive investigation even as rescue efforts were being organized. News gathering organizations began comprehensive coverage with radio and television reporters on

the scene in Oklahoma City and everywhere else where events thought to be related were occurring.

The President and the Attorney General of the United States made public statements committing all available investigative resources to determine what had happened and who was responsible, with pledges to seek the death penalty for the perpetrators.

At 10:20 a.m. on Highway I-35 about 70 miles north of Oklahoma City, State Trooper Charles Hanger stopped a 1977 yellow Mercury Marquis automobile because the vehicle was not displaying a license plate as required by Oklahoma statute. The driver of that automobile gave his name as Timothy McVeigh, showed a driver's license, gave his address as 3616 North Van Dyke Road, Decker, Michigan, and gave the name of James Nichols of Decker, Michigan as a reference. Mr. McVeigh had a loaded handgun and a knife. Trooper Hanger arrested Timothy McVeigh for misdemeanor offenses and took him to the Noble County Jail in Perry, Oklahoma. Mr. McVeigh's clothing and personal effects were placed in a storage room at the jail pursuant to the general policy of Sheriff Jerry R. Cook.

At some time on April 19, investigators going through the rubble at the explosion site found an axle from which they obtained a vehicle identification number indicating that it was on a Ryder truck which they traced to Elliot's Body Shop in Junction City, Kansas. People interviewed at that business advised that the truck had been rented to a man who presented a South Dakota driver's license with the name Robert Kling. Through interviews and records checks FBI agents learned that

Timothy McVeigh had registered at the Dreamland Motel in Junction City, on April 14, using the Decker, Michigan address.

At approximately 11:30 p.m. (E.D.T.) on Thursday, April 20, FBI agents contacted Detective David Hall of the Sanilac County Sheriff's Department in Michigan seeking information about the Decker address given by Timothy McVeigh. Detective Hall reported that the address was a farm belonging to James Nichols and that the sheriff's office had conducted an earlier investigation of that farm because of reports from Kelly Langenburg, the ex-wife of James Nichols. Detective Hall said that he had been told that Timothy McVeigh had stayed with James and his brother Terry Nichols at the Decker farm. The FBI interviewed Kelly Langenburg in Michigan at approximately 9:00 a.m. (E.D.T.) on Friday, April 21. During the afternoon of that day, FBI agents surrounded the James Nichols farm and conducted an extensive search of it pursuant to a warrant. News of that search was telecast by CNN. The FBI also learned that Kelly Langenburg's sister, Lana Padilla, had been married to Terry Nichols. Agents found her in Las Vegas, Nevada, and questioned her as well as Josh Nichols, the 12-year old son of Terry Nichols and Lana Padilla.

On April 21, the FBI filed a complaint in the United States District Court for the Western District of Oklahoma, charging Timothy McVeigh with participation in bombing the Murrah Building. The court issued a warrant for his arrest. At about 10:00 a.m. federal agents contacted Sheriff Cook in Perry, Oklahoma, to inquire about Mr. McVeigh's status. Upon learning that he was still in custody, agents went to the Noble County Jail

arriving there at about noon. The FBI agents formally placed Timothy McVeigh under federal arrest at about 4:30 p.m. and removed him from the Noble County Jail at around 6:00 p.m. Sheriff Cook's secretary, Deborah Thompson, typed an inventory of Mr. McVeigh's property and reviewed it with FBI fingerprint examiner Louis Hupp, who had come to the Noble County Jail to fingerprint Mr. McVeigh and obtain his property. Mr. Hupp added some handwritten items on the typed inventory and signed a receipt for the property at about 4:30 p.m. after fingerprinting Mr. McVeigh. After Timothy McVeigh was taken from the building, Mr. Hupp took the prisoner's clothes and personal property to the Prairie County Airport, got on an airplane and went to Washington D.C., where he delivered Mr. McVeigh's belongings to the FBI laboratory for testing.

Earlier that afternoon, at about 3:55 p.m., United States Magistrate Judge Howland, in Oklahoma City, issued a warrant for the search and seizure of Mr. McVeigh's clothing and personal property. The warrant was not given to Sheriff Cook, and it expired by its terms on April 28, 1995. The search warrant was returned to the court in Oklahoma City marked "returned not executed" on May 4, 1995.

The overall FBI investigation was being coordinated at the Strategic Information Operation Center ("SIOC") in FBI headquarters in Washington, D.C. Information coming in from agents working throughout the country was routed through the SIOC where FBI General Counsel Howard Shapiro was working with Merrick Garland, principal assistant to Deputy Attorney General Jamie

Gorelick. Other command posts were operating at Oklahoma City, Kansas City, Fort Riley, Las Vegas and Detroit. Working with the FBI agents at the command post in Oklahoma City, were Donna Bucella, Deputy Director of the Executive Office for United States Attorneys, Jim Reynolds, head of the Anti-Terrorism Division of the Department of Justice, and assistant U.S. Attorneys for the Western District of Oklahoma, Arlene Joplin, Jerome Holmes and Vicki Behenna.

Chief Judge Russell and Magistrate Judge Howland of the United States District Court for the Western District of Oklahoma came to the Oklahoma City command post during the afternoon of April 21, 1995, to consider applications for such warrants as may be requested. There were open lines of communication connecting all of these command posts and the SIOC in Washington.

Almost all of the investigative activity was being reported in telecasts and radio broadcasts as it was happening. FBI agents in the field were well aware of the coverage and the media's interest in keeping abreast of late-breaking developments. For example, agent William Chornyak at the Kansas City command post first learned of the search of the James Nichols' farm in Michigan through the coverage by CNN.

Terry Nichols lived with his wife Marife and 20-month old daughter, Nichole, at 109 South Second Street in Herington, Kansas. The information associating him and his brother with Timothy McVeigh made Terry Nichols a subject of interest to the FBI, and in the early afternoon of April 21, an FBI SWAT team was dispatched to go to Herington to prepare for a search of Terry

Nichols' residence. Other teams of FBI agents went to Herington throughout that Friday afternoon. During the morning of April 21, FBI agent Stephen Smith contacted Dale Kuhn, the Herington Public Safety Director, and Barry Thacker, Assistant Director of Public Safety, at the Herington Department of Public Safety Building ("police station") to get information about Mr. Nichols. They gave agent Smith Mr. Nichols' home address and said that he had been at the police station during the previous week to register his vehicle. Agent Smith and agent Foley drove to the Nichols' residence to begin surveillance. Supervisory agent Thomas Price and a nine-member surveillance team had also been sent to cover the Nichols' home. Herington is a small community of about 2,600 persons and all of these FBI vehicles were presumably noticeable to the residents.

After hearing Timothy McVeigh's name mentioned as a suspect in a newscast about the Oklahoma City bombing investigation, and hearing some mention of his own name, Terry Nichols got into his blue pickup truck with his wife and daughter and drove to Surplus City, a local hardware store, where he stopped, stepped out of his truck briefly, got back into it, turned around, and went to the police station, arriving at 2:50 p.m. Mr. Nichols, with his wife and daughter, went in the front door, where they were met by Barry Thacker. Terry Nichols identified himself and said that he wanted to talk with someone to find out why his name was being broadcast in connection with the bombing investigation. Dale Kuhn then entered the room and joined in the conversation. Both Kuhn and Thacker said that they did not know the answer to Terry Nichols' questions. They asked whether Mr. Nichols was

carrying any weapons and then requested a visual search. Terry Nichols readily complied by taking off his jacket and lifting his shirt. Chief Kuhn said he would try to get someone to answer Mr. Nichols' questions. The family was left alone in the officers' room at the police station while Chief Kuhn and Assistant Chief Thacker went to contact the FBI.

FBI agents Smith and Price had seen Terry Nichols go into the police station. They reported that information to FBI agent Chornyak in Kansas City who then called Chief Kuhn at the police station asking whether there was any kind of crisis situation or any danger. That call was made because of a concern that Mr. Nichols might be wired with explosives. Agent Price was instructed to try to interview Mr. Nichols and to keep him under surveillance if he left the police station. Agent Chornyak promptly reported to agent Rich Baker in the Oklahoma City command post that Terry Nichols had "turned himself in."

Four FBI agents, Smith, Price, Foley and Gillespie, entered the police station at about 3:10 p.m. and identified themselves to Terry Nichols and Marife Nichols. Mr. Nichols immediately asked the agents why his name was being broadcast. Agent Foley said he was not sure, but the FBI wanted to ask him questions. Agent Smith referred to past association with Tim McVeigh as the reason for the agents' interest in questioning Mr. Nichols. Terry Nichols said that he had his own questions for the agents.

Following another search of Terry Nichols, Marife and their child for weapons, Terry Nichols voluntarily went with agents Smith and Foley into the basement of

the police station where Chief Kuhn arranged chairs, showed them the restrooms and offered to provide coffee or anything else they needed. The basement was used frequently as a classroom and meeting room for the Herington police and fire departments. The basement meeting room is the largest room in the police station, other than the garage. The lighting quality was good and the room had adequate ventilation and temperature controls. There are no windows.

A few minutes after the discussion began, agent Foley said that he intended to advise Terry Nichols of his rights. Agent Foley handed Mr. Nichols FBI form FD 395, entitled "Interrogation – Advice of Rights," and asked Mr. Nichols to read it aloud. That form sets out a full advisement of rights as required for a custodial interrogation under *Miranda v. Arizona*, 384 U.S. 436 (1966).

Agent Foley and Terry Nichols discussed the contents of the form for about 17 minutes. Mr. Nichols said that he would not sign this form because the word "Interrogation" in the title reminded him of the Nazis. Agent Foley responded that Mr. Nichols need not sign the form as long as he understood his rights. When asked directly whether he understood his rights, Terry Nichols responded that he did and that he wanted to talk with the agents.

During the discussion about the *Miranda* form, agent Foley told Mr. Nichols that he was free to go, that the agents had no cause to hold him, and that he could walk out the door if he wanted to do so. Mr. Nichols told the agents that he had come to the police station because he did not want "another Waco."

Terry Nichols' refusal to sign the advice of rights form was relayed to Howard Shapiro, who directed agent Chornyak to instruct the agents to try to get Mr. Nichols to talk with them and to remind them that he was not in their custody. Mr. Shapiro told agent Chornyak that a material witness arrest warrant for Mr. Nichols was going to be obtained in Oklahoma City, and that if Mr. Nichols decided to leave the station, the agents should maintain close surveillance until they could arrest him on that warrant.

At approximately 4:12 p.m., FBI agents Scott Crabtree and Dan Jablonski entered the interview room. Agent Smith, who had been assigned to take notes, read his notes aloud for them, asking Terry Nichols to stop him at any time to tell him of any errors, inconsistencies or additions. Mr. Nichols added certain things to clarify his statements.

During this review of his notes, agent Smith told Crabtree and Jablonski that Mr. Nichols had received *Miranda* warnings and that he had said that, while he understood his rights and wanted to talk, he refused to sign the "Advice of Rights" form. Terry Nichols said nothing to disagree with agent Smith's recital. Agent Jablonski addressed Mr. Nichols telling him again that he was free to go and asking again if he understood his rights. Mr. Nichols said that he did understand and wanted to continue to talk with the agents.

Mr. Nichols asked if he could get a copy of agent Smith's notes, and agent Smith responded affirmatively. There was no specific discussion about when and where the copy of the notes would be provided to Terry Nichols.

Agents Foley and Jablonski left the meeting room at 4:53 p.m., returning at times during breaks in the interview conducted by agents Smith and Crabtree during the remaining afternoon and evening. During each break, Terry Nichols was free to use the restroom and partake of food and drink. There was no display of weapons in the room, and Mr. Nichols never asked to consult with an attorney or whether he was under arrest. Mr. Nichols never complained about the duration, site, scope, or substance of the agents' questioning, and he never asked to stop the questioning or refused to continue talking.

At 8:52 p.m., a few minutes after a break in the interview, Marife Nichols, with Nichole, entered the basement meeting room with agents Jablonski, Foley and Thomeczek. Mr. and Mrs. Nichols spoke privately for about five minutes in the basement hallway a few feet away from the agents. Agent Jablonski heard Terry Nichols tell his wife that he did not know when he would be leaving, saying "I have to finish answering questions." Terry Nichols then handed Marife a telephone credit card which agent Jablonski copied when she and he went back upstairs. The card was then returned to Mrs. Nichols.

After another break, from 10:21-10:50 p.m., during which no agents spoke with Terry Nichols, agents Crabtree and Smith asked whether Mr. Nichols would like to hear a taped message from his ex-wife Lana and son Josh; Mr. Nichols said he did, and the agents played it for him. The FBI had made that recording earlier that day in Las Vegas. Josh asked his father to cooperate with the FBI.

At 12:10 a.m. on April 22, agents Smith and Crabtree left the interview room and were replaced by agents

Foley and Jablonski. Agent Jablonski became aggressive in his questioning, raising his voice and accusing Terry Nichols of lying to the agents. Agent Jablonski then arrested Terry Nichols on a material witness warrant from the U.S. District Court in Oklahoma City, and the interview ended.

While the FBI agents in Herington were securing the Nichols' residence and truck, and questioning both Mr. and Mr. [sic] Nichols, Henry Gibbons, an FBI agent and lawyer, working with the attorneys in the Oklahoma City command post, obtained that arrest warrant for Terry Nichols as a material witness. It was one of six search and arrest warrants signed in the Oklahoma City command post on Friday, April 21, 1995. Mr. Gibbons was the affiant on all the warrant applications, using information received from FBI agents in the field and other command posts during what he said was the busiest day of his life.

Mr. Gibbons was first directed to draft an affidavit for a warrant to arrest Terry Nichols as a material witness at approximately 4:00 p.m. Justice Department lawyer Jim Reynolds in Oklahoma City prepared the format for the warrant, using, as a model, a material witness warrant that was issued on the previous day for the arrest of Abraham Abdallah Ahmed as a witness. Mr. Ahmed had left Oklahoma City on an American Airlines flight shortly after the explosion on April 19 and was detained in England. The face of the Ahmed warrant recited that he "has attempted to leave the jurisdiction of the United States, and it may become impracticable to secure his presence by subpoena." (Ex. 71). The first form of warrant for the arrest of Terry Nichols as a witness presented to and signed by Chief Judge Russell bore the same

recital as the Ahmed warrant – that the witness attempted to leave the jurisdiction of the United States. It also mistakenly bore the caption "United States v. Terry Lynn Nichols," and was entitled "Warrant for Arrest" without indicating that it was for the arrest of a witness. (Ex. 26). The Ahmed warrant had also incorrectly identified Ahmed as the named defendant.

When government counsel discovered the mistake in the caption of the Terry Nichols warrant and informed Judge Russell about it, he signed a second form of warrant, with the correct caption and suggested shredding the one signed earlier if it had not been sent out. A copy of the first signed warrant for Mr. Nichols had already been transmitted by facsimile to FBI agent Chornyak in Kansas City at 4:45 p.m. (Ex. 26).

The second form of warrant to arrest Terry Nichols as a material witness did not include the recital about an attempt to leave the jurisdiction of the United States. It simply stated the conclusion that, if left to his own devices, it would be impracticable to secure his presence at such time as the case is called before the grand jury. (Ex. 22). The same affidavit of Henry Gibbons was used in support of both of the Nichols warrants signed by Judge Russell. The affidavit itself said nothing about any attempt by Terry Nichols to leave the jurisdiction of the United States. It did allege that a person closely associated with Terry Nichols advised that Mr. Nichols had publicly renounced his citizenship.

Neither Mr. Gibbons nor the government lawyers told Judge Russell that Terry Nichols was at the Herington police station when they presented the application

for a warrant for his arrest. The Assistant Director of the FBI's Intelligence Division in Washington, D.C., "Bear" Bryant, was informed immediately when the first warrant was signed, and he advised agent Chornyak who relayed that information to agent Price in Herington at about 4:30 p.m. Agent Price told agent Gillespie that they soon would receive a copy of the arrest warrant. Agent Chornyak received a facsimile copy at 4:45 p.m. He faxed copies to agent Price at the Herington police station and to agent Joe Bross at the Fort Riley command post shortly after 5:00 p.m.

Randall Rathbun, then United States Attorney for the District of Kansas, went to the Fort Riley command post on the instructions of Deputy Attorney General Gorelick to prepare an application for a warrant to search the Nichols' residence in Herington. Mr. Rathbun was not told about the material witness arrest warrant for Mr. Nichols in a briefing given to him by agent Bross at Fort Riley. Mr. Rathbun went from Fort Riley to the Herington police station, arriving there at approximately 8:45 p.m.

Agents Smith, Crabtree, Foley and Jablonski were not told about the arrest warrant when it arrived because of a command decision to keep the interview going, recognizing that upon his arrest Terry Nichols might stop talking.

Terry Nichols first learned of the warrant for his arrest when agent Jablonski made the formal arrest after midnight. The record shows that agent Jablonski read Mr. Nichols his *Miranda* rights at 12:25 a.m. on April 22. Mr. Nichols refused to sign the "Advice of Rights" form, and the interview ended. After his arrest, Terry Nichols was taken to a county jail in Abilene, Kansas, and held there

before being taken to the federal courthouse in Wichita for his initial appearance later in the day.

There were activities outside the Herington police station that were not known to Terry Nichols during the interview. After seeing telecasts suggesting that Terry Nichols was in custody in Kansas, the Kansas Federal Public Defender, David J. Phillips, on his own initiative, began making inquiries to locate Mr. Nichols. He called the Herington police station at 9:38 p.m. offering to represent Terry Nichols if he was there. Someone took the message without comment. Upon hearing of this call, agent Price told Chief Kuhn that the lawyer's name and phone number would be given to Terry Nichols if he asked for a lawyer. No one told Mr. Nichols about that offer for legal assistance, and he did not request counsel while he was at the Herington police station or at the jail in Abilene.

The SWAT team from Kansas City arrived at Fort Riley about 40 minutes after Terry Nichols' appearance at the Herington Police Station. Because of that development they left their SWAT team weapons and gear at Fort Riley and proceeded to Herington in their normal role as investigators.

Acting on the possibility that Terry Nichols might have an explosive device in his truck or his home, the police and the FBI investigators evacuated all occupants of the buildings from a one-block area north of the police station where the truck was parked and blocked off the streets around Nichols' house. Occupants of houses in the immediate area of the house were asked to leave.

There was an intense interest in searching the truck and residence. Accordingly, the agents asked Terry Nichols for his consent to search early in the interview. At 4:34 p.m. Terry Nichols signed a standard FBI consent form witnessed by agents Jablonski and Foley, after adding the notation "without prejudice U.C.C. 1-207." (Ex. B-1). He asked whether he or his wife could be present during the search, and the agents gave an affirmative response. Later, during one of the breaks in questioning, agent Foley said that he was concerned for the safety of the searching agents and asked Mr. Nichols to make a sketch of his home and show where ammunition and firearms were located. Terry Nichols drew a sketch of his house, clearly marking the locations of guns and ammunition shortly before 9:00 p.m. (Ex. 33).

On Saturday afternoon, April 22, agents Smith and Crabtree transported Terry Nichols from the jail in Abilene to Wichita, for his initial appearance in court. Agent Crabtree told Mr. Nichols that they were going to go to Wichita where an attorney would be appointed to represent him, and he would appear before the court. Ten or fifteen minutes into the ride Terry Nichols asked the agents whether his residence had been searched. Agent Crabtree responded that the agents had not yet searched the home because they were proceeding very carefully due to safety concerns, not knowing what dangers might be there. Terry Nichols was reassuring, saying that the only items requiring caution were loaded weapons, and he again described their locations. He also advised that there were intrusion alarms, noting that the one monitoring the back door was not functioning. There was some additional discussion during the trip. Upon arrival at the

federal courthouse in Wichita, deputy U.S. Marshals came to the FBI automobile and took Mr. Nichols into the building. Agents Smith and Crabtree locked the vehicle and went to the Marshal's office where they asked one of the deputies to inform Terry Nichols that the agents were available if he wanted further conversation with them.

While undergoing routine processing with Deputy Marshal Daryl Ingermanson, Mr. Nichols said that he "wished to speak with the agents before he went to court." Deputy Ingermanson responded that he would be happy to bring the agents back to the holding cell. A little later, the agents came to the cell and had additional conversation with Mr. Nichols which was interrupted when court appointed counsel arrived.

In response to deputy Ingermanson's inquiry, Terry Nichols gave the names "Joe Rivers" and "Ted Parker", as names he had used and deputy Ingermanson noted them as aliases on the standard personal history form.

At his initial appearance before U.S. District Judge Monti Belot at 4:55 p.m. on April 22, Mr. Nichols was represented by the Kansas Federal Public Defender, David Phillips and his assistant Steve Gradert. Mr. Nichols expressed some confusion to the judge, saying that the warrant reported that he had attempted to leave the jurisdiction of the United States, whereas he went down to the police station voluntarily. The hearing was continued on April 26, with the same lawyers appearing for the detained witness. Mr. Phillips told the court that the affidavit for the warrant was not contested but that Mr. Nichols did challenge the finding that it may be impracticable to secure his presence by a subpoena, the

statutory basis for the arrest of a material witness. Accordingly, counsel moved to quash the warrant arguing that Terry Nichols had been cooperative, voluntarily meeting with the authorities and consenting to a search of his house and vehicle. Judge Belot denied the motion, finding probable cause for the material witness arrest and ordered that Terry Nichols be detained. (Ex. 35).

Agent James Reightler went to Herington on Friday, April 21, as a member of the original SWAT team from Kansas City by way of Junction City. He first went to the Herington police station, at approximately 5:30 p.m., where he was instructed to secure Mr. Nichols' home. At least eight to ten local police and FBI agents were assigned to assist in that task. The FBI supervisor said that although the owners of the property had consented to a search, no search was going to be undertaken that night because of the possibility that there may be explosives on the premises.

Intermittent surveillance of the Nichols' home began at approximately 2:40 p.m. on the afternoon of April 21. The FBI surveillance log indicates that the house was under continuous surveillance by 3:20 p.m. At 4:20 p.m., agents Lindsey, Barger and Maxwell were in the process of putting police security tape around the property.

When agents Reightler and Marlin Ritzman arrived at the Nichols' home at about 6:00 p.m. they saw that agents had control of the area, and they were told that no one had entered or left the house for at least three hours. There were many news gatherers in the immediate vicinity and a crowd of onlookers had collected.

Around 6:00 to 6:30 p.m., agent Reightler walked along the perimeter of the property going from the front to the rear of the house to contact the other agents and to familiarize himself with the property. The garage is within fifteen feet of the house. There is a short concrete walkway connecting the buildings within a wire perimeter fence. The windows of the garage were covered with shades similar to the window shades of the home.

At about 8:30 p.m., agent Reightler again walked along the edge of the Nichols' property, stopped, and, with the aid of a flashlight, looked into the garage through a window with a torn shade. Reightler testified that he looked in the window because he had been told the owners had consented to a search and because he was concerned about possible hazards inside the garage. Agent Reightler saw four white plastic barrels with blue lids, a large number of military-style ammunition cans, some fuel cans, hardware and tools.

Later that evening, in a meeting with other agents, agent Reightler learned that technicians at the Murrah Building site had said that a bomb had likely been contained in white plastic containers with blue lids. Reightler thought that he had seen such containers in the garage, but he had not looked closely enough to determine whether the barrels appeared to be wired or connected to a timing device. Accordingly, he returned to the garage for another look through the window at about 9:30 p.m. He again saw the four white plastic barrels and decided that there was no visible indication that they presented any immediate danger.

Marife Nichols was born on June 11, 1973. Before meeting Terry Nichols she lived in the Philippines in a two-room structure, without a lockable door, shared by seven or eight other people, without an interior toilet or running water. Her father was a police officer as had been her grandfather. Mrs. Nichols learned English as a second language in a school where the last two years of high school courses were taught in English.

Marife married Terry Nichols on November 20, 1990. She came to the United States with him in 1991. They first lived in Henderson, Nevada, and then moved to Michigan where they lived at the James Nichols' farm on and off for about two years. Their daughter Nichole was born in August, 1993. Mrs. Nichols went back to the Philippines in 1994 to attend Southwestern University there, taking college courses taught in English.

In the early afternoon of Friday, April 21, 1995, Terry Nichols heard on the radio that Timothy McVeigh had been arrested on a traffic charge and was a suspect in the Oklahoma City bombing. Mr. Nichols told his wife that he also heard his name mentioned. Mr. and Mrs. Nichols then saw a report about the bombing on television, and Mrs. Nichols heard that Timothy McVeigh was arrested. Terry Nichols gave Marife Nichols $200 before taking her and Nichole with him to the Herington police station. When the Terry Nichols family went into the Herington Police Station and Terry Nichols went to the basement with FBI agents, Marife and Nichole Nichols stayed in the officers' room on the main floor.

Marife Nichols was searched by a female Herington police employee at the direction of the FBI. A Herington

police officer also searched the clothing and body of Nichole. The officers' room had no windows or clock. Marife and Nichole Nichols stayed there for the next six hours in the company of William White, a U.S. Army CID agent, and FBI agent Eugene Thomeczek. FBI agent Sheila Dobson joined them when she arrived at the police station late in the afternoon. Mrs. Nichols talked freely with these agents. None of them told her that she had a right to remain silent; that she could refuse to say anything against her husband; that she had a privilege not to disclose private marital communications or that she had the right to be represented by counsel. Marife Nichols testified that CID agent White encouraged her to tell the truth, "so that it will show that [she has] nothing to hide. That way, Mr. Thomeczek would not repeat his question again and again." (Tr. p. 714).

The agents denied Mrs. Nichols' request to go out to the truck to get diapers for her daughter, telling her that she should not go outside because the media would confront her and that she could not enter the truck because it was going to be checked by a bomb detection squad from the Army. Agent Dobson went to a grocery store, purchased diapers and brought them back to the station.

After several hours of conversation, agents Thomeczek and Dobson asked Marife Nichols for her consent to search the truck and the house, showing her the standard FBI consent form. Mrs. Nichols' first response to the agents was "[y]ou have to get the permission from Terry, because it's his house." The agents replied "We're going to get that and we need yours too." (Tr. p. 722). Mrs. Nichols asked Agent Dobson about the words "right to refuse to consent to such search" on the

consent form. When agent Dobson told Mrs. Nichols she could refuse to grant consent, Marife Nichols asked what would happen if she did refuse. Agent Thomeczek responded that they would then have to go to court and get a search warrant which would take time. Mrs. Nichols signed two separate written consents to search: one for the premises at 109 South Second Street, (Ex. W-14A), and one for the truck. (Ex. W-14B). Later, agent Thomeczek wrote on the forms that no consent search was done on April 21.

When Mrs. Nichols asked to see her husband, agents Thomeczek, Jablonski, and Foley took her and the baby to the basement meeting room. Marife and Terry Nichols had a conversation for a few minutes, standing away from the agents, after which Mr. Nichols gave his wife a telephone charge card. When agent Jablonski asked to make a copy of the credit card she complied without making any protest.

The agents told Mrs. Nichols that she could not return to her residence. After first saying they would go to Junction City, agents Thomeczek and Dobson drove Mrs. Nichols and her daughter to a Best Western Inn in Abilene, Kansas, where CID agents White and Dawn Grey joined them. Marife Nichols and her daughter were given a private room in the motel. They and the agents stayed in Abilene on Saturday, April 22. Mrs. Nichols purchased some clothes, rejecting agent Dobson's offer to pay for them. Mrs. Nichols said that she bought them using money her husband had given her because she preferred not to be a burden on anyone. The FBI agents paid all of her other expenses during that weekend and

for the remainder of the time that they had supervision of her.

On Sunday, April 23, the agents took Mrs. Nichols to her home in Herington to get some of her clothing and personal property. Before going to the house, agents Thomeczek and Jablonski asked her to sign another consent to search form for the residence and the truck. Mrs. Nichols told the agents that she would sign the document, even though she said she did not completely understand. In signing, she wrote her first name twice, crossed out one of them, and added the notation, "without prejudice UCC 1-207" above her signature. Seeing that reservation, agent Thomeczek asked Mrs. Nichols to say clearly whether she did or did not consent to the searches. She said that she did consent, explaining that the notation was something she had learned from Terry Nichols and Black's Law Dictionary.

Inside the house, the agents told Mrs. Nichols that she could be there for only about 45 minutes because when the news media learned she was there they would try to interview her on camera and get pictures of her and Nichole. Mrs. Nichols did not want to be questioned or photographed by reporters and did not object to limiting her time in the house.

Although Mrs. Nichols had to hurry to gather and pack her belongings, she had telephone conversations with her mother in the Philippines and her aunt in California while she was in the house that Sunday afternoon. She had talked with her parents earlier that weekend. Mrs. Nichols went into each room and the basement of the house. When she left with the agents, she had to

cover her and Nichole's faces to avoid the taking of pictures by anyone in the large crowd that had gathered outside the house.

As they drove away, agent Thomeczek handed Mrs. Nichols an inventory listing the items that had been taken by the FBI. When she read the list she saw that it did not include $5,000 in currency and a number of valuable coins that she kept in the box springs of the bed. Mrs. Nichols had mentioned the money and coins to agent Thomeczek during their conversation at the police station on Friday.

The $5,000 was extremely important to Mrs. Nichols. She saw it as the only means available to her to purchase a plane ticket and go to her parents in the Philippines. When she saw that it was not in the inventory, she asked agent Thomeczek to go back to the house to get it. Agent Thomeczek refused her request. Back at a motel near Fort Riley, Mrs. Nichols again requested her money, and agent Thomeczek again refused, explaining that the FBI wanted to take the currency to a laboratory to test it for fingerprints of Timothy McVeigh.

Marife Nichols unsuccessfully tried crying to persuade agent Thomeczek to return her money. He gave her a handwritten consent to search containing the following language:

> 1. I, Marife Torres Nichols, have been asked by Special Agents of the Federal Bureau of Investigation to complete a limited search of my premises at 109 So. 2nd St., Herington, KS.
>
> This search is to locate certain valuables now concealed within those premises.

2. I have been advised of my right to refuse consent.
3. I give this permission voluntarily.
4. These agents are authorized to remove these valuables as may be related to their investigation.

(Ex. G-1). Mrs. Nichols signed, using the "without prejudice" notation, at a few minutes after 5:00 p.m. on April 23, believing that this would somehow expedite the return of her money.

Later, on Sunday evening at about 9:10 p.m., agent Thomeczek asked Mrs. Nichols to sign another consent to search the garage for a padlock that the FBI thought may be there. She did so, adding the notation, "without prejudice UCC 1-207." (Ex. W-5).

The next day, Monday, April 24, agent Dobson asked Mrs. Nichols to sign a consent form to allow the FBI to return to the Herington house to search for and seize a Shop Vac vacuum cleaner. Mrs. Nichols signed the form with the same "without prejudice" notation. (Ex. H-1).

At 9:40 p.m. on that Monday evening, agents Mary Jasnowski and Eugene Thomeczek obtained another written consent from Mrs. Nichols to search the residence and seize the Nichols' family dishes. When Mrs. Nichols signed she again wrote the notation "without prejudice UCC 1-207." (Ex. I-1).

On the following day, April 25, at 3:17 p.m., FBI agents procured yet another consent from Mrs. Nichols to

search the Herington house. (Ex. J-1). Mrs. Nichols testified that she continued to cooperate in the hope that it would help her return to the Philippines.

On several occasions during her days with them, Mrs. Nichols told the agents that she wanted to be in her house in Herington. They told her that she could not live there because she would be badgered by the media, and there would be bills to pay. Chief Kuhn had also said to her that the Herington police could not provide for her safety if she returned to the residence, fearing the possibility of some vengeful or retaliatory act against her and her child.

On April 26, Mrs. Nichols made a telephone call to Terry Nichols, after agreeing to permit the FBI to tape record the conversation with a signed consent and the same UCC notation. She spoke the following words during that call:

> I – I don't really want to stay here because, you know, I don't know – I don't have vehicle. I can't – I'm totally helpless.
>
> I'm depending on these people here and uh – I don't wanta give any hassle to anyone.

(Tr. p. 762.) As will be discussed later, those comments, for whatever reason, overstated the circumstances and her reaction to them. She knew she was being recorded. On April 30, the FBI made a consensual tape recording of a telephone call between Mrs. Nichols and Robert Nichols, Terry Nichols' father.

On May 3, agent Dobson presented Mrs. Nichols with additional consent forms to search the house and truck, saying that the FBI needed to make another search.

On May 8, 1995, the FBI agents told Mrs. Nichols that they were going to take her to Oklahoma City to appear before a grand jury. Believing that she may never again see the Herington house, she asked to go back there to pick up more of her possessions. Agents Thomeczek and Dobson and a third agent went in with her. While they were all in the house, agent Dobson asked for permission to take a kitchen mixer that Mrs. Nichols had mentioned in a previous interview. Mrs. Nichols acceded to the request, prompting agent Dobson to ask, "[What] else can we take?" Mrs. Nichols responded, in a joking manner, that the FBI could . . . "take the whole house, as long as you're going to . . . give me my money and send me to the Philippines." (Tr. p. 769.)

Mrs. Nichols was taken to the United States Attorney's office in Oklahoma City on May 9, where she met with FBI agents Hawkins, Thomeczek and Dobson, together with Assistant U.S. Attorneys Joplin and Holmes. Donna Bucella from the Justice Department also participated in the meeting. No one told Mrs. Nichols that she had a privilege to refuse to testify against her husband, and no one told her about a privilege to refuse to disclose private marital communications.

During the interview Marife Nichols asked if she needed a lawyer and one of the government lawyers said that, because she was not a suspect, she did not need a lawyer unless she was not telling them the truth. After spending a half day with these lawyers and agents, Mrs. Nichols was told that her appearance before the grand jury would be postponed. She was given a subpoena to return to Oklahoma City on May 16, 1995. Mrs. Nichols was taken to Wichita and then to Kansas City, Missouri,

for the convenience of the agents living there who went to their homes for the weekend.

Agents Thomeczek and Dobson took Mrs. Nichols back to Oklahoma City on May 17, the day after her subpoena date. The lawyers then told her that she would not have to testify before the grand jury because they thought that she had been telling them the truth.

At some time, while she was with the FBI agents, Mrs. Nichols and her daughter were fingerprinted and Mrs. Nichols gave hair samples without objection.

On May 19, 1995, agents Thomeczek and Dobson asked Mrs. Nichols to sign a consent to search form to enable the FBI to enter the Herington house to retrieve toys and clean out the refrigerator as she had earlier requested to do herself. (Ex. W-11).

Mrs. Nichols made many telephone calls during the days she was with the FBI agents. She talked with her relatives in California and with Terry Nichols' family in Michigan. She also talked with representatives of the Philippine government and met them personally on one occasion. She asked for, but did not get, help from anyone in reaching her goal of returning to her parents' home. The agents told her not to give anyone telephone numbers where she could be reached because the press would learn where she was and become a nuisance to her. The agents were not with Mrs. Nichols continuously. She and her daughter were left alone at times, and no agent stayed in or guarded the rooms in the hotels and motels where they stayed.

Mrs. Nichols did not get her money until after she talked with one of her husband's lawyers, Ron Woods. She finally was given $4,800 on May 24, 1995, and the FBI then stopped paying for her support. Marife Nichols and her daughter immediately got on a bus to California and were then taken by a friend to the San Francisco airport for the long awaited flight to the Philippines.

McVeigh Motion to Suppress FBI Seizure of Clothing and Personal Effects

The defense concedes that apparent violations of Oklahoma's motor vehicle laws gave Trooper Hanger probable cause to stop the automobile Timothy McVeigh was driving and that his possession of the gun and knife gave probable cause for his arrest. The booking search and the taking of Timothy McVeigh's street clothing and personal effects at the Noble County Jail are not challenged. Although counsel questioned the lack of a formal protocol for this necessary procedure, the evidence shows that the sheriff's staff followed their normal practices in putting Mr. McVeigh's property in a room where other prisoners' property was stored.

The motion to suppress any evidence obtained from Mr. McVeigh's clothing and personal effects is based on the contention that the transfer of his property to the FBI and the taking of it to the FBI laboratory in Washington D.C., without presenting a warrant to the Noble County Sheriff, violated the rights of Mr. McVeigh protected by the Fourth Amendment to the United States Constitution.

Timothy McVeigh puts forth *Brett v. United States*, 412 F.2d 401 (5th Cir. 1969), as precedent in support of his

argument that a warrant was required for the seizure and laboratory inspection of his clothing and personal effects. There, as here, the defendant was arrested, taken to jail, and given institutional garb in exchange for his clothes which were placed in a bag in a property room for safekeeping. Three days later, the investigators searched that clothing and found a packet of heroin in the watch pocket of the defendant's pants. In a divided opinion, two judges on the three-judge panel determined that the late search infringed the defendant's right of privacy. The court's reasoning flowed from the basic premise that all warrantless searches are presumed to be unreasonable and that there had been no showing of exigent circumstances justifying the failure to request authority from a neutral magistrate.

The government counters with authority from the Supreme Court in *United States v. Edwards*, 415 U.S. 800 (1974). In that case Edwards was lawfully arrested and placed in a jail cell late in the evening. He was charged with attempting to break into a post office, and the crime scene showed evidence of a forcible entry through a window, leaving paint chips behind. Because substitute clothing was not available, the defendant stayed in his street clothes until the next morning when new clothing was purchased for him. The clothes worn at the time of his arrest were then taken and examined. They contained paint chips matching the samples taken from the window. A majority of five justices, speaking through Justice White, determined that the delay in the taking and testing of the clothing did not change the analysis that would

have characterized this action as a permitted search incident to an arrest and routine booking of a person lawfully arrested. Justice White framed the question as follows:

> The question here is whether the Fourth Amendment should be extended to exclude from evidence certain clothing taken from respondent Edwards while he was in custody at the city jail approximately 10 hours after his arrest.

Id. at 801.

In answering no and applying the familiar law authorizing a search incident to arrest, the Court quoted with approval the following language from the First Circuit in *United States v. DeLeo*, 422 F.2d 487, 493 (1970) (footnote omitted):

> While the legal arrest of a person should not destroy the privacy of his premises, it does – for at least a reasonable time and to a reasonable extent – take his own privacy out of the realm of protection from police interest, in weapons, means of escape and evidence.

United States v. Edwards, 415 U.S. at 808-09.

In footnote 7 in its opinion the Court cited the Tenth Circuit case of *Baskerville v. United States*, 227 F.2d 454 (10th Cir. 1955), among other cases, and noted that the *Brett* case was contra. Although it did not say so explicitly, the Court's reasoning was contrary to that of the Fifth Circuit in *Brett*. Justice Stewart, writing the dissent in *Edwards*, followed the same approach taken in *Brett* by rephrasing the question as whether the Fourth Amendment is to be ignored. Finding no justification for dispensing with the warrant requirement and holding to the

traditional view that all warrantless searches are per se unreasonable and must be justified by some exceptional circumstances, the dissenting justices said that the warrantless search was unconstitutional.

The holding in *Edwards* supports a warrantless seizure of Mr. McVeigh's property in this case. The defense seeks to distinguish the case, arguing that because the search in *Edwards* was for evidence of the crime for which the defendant was arrested, the ruling is merely a reasonable extension of the well-established law permitting the police to make a warrantless search incident to an arrest. Here, two days after the arrest of Mr. McVeigh on local charges, the FBI was looking for evidence connecting him with the suspected bombing of a building in Oklahoma City, a very different and much more serious matter than the misdemeanor charges on which he was being held. The legal significance of that difference is not apparent. The Fourth Amendment protects the privacy rights of persons, not property. *Katz v. United States*, 389 U.S. 347 (1967). The critical question here is what privacy right did Timothy McVeigh have, while he was lawfully in jail, to deny FBI access to the clothing and personal effects he was wearing and carrying at the time of his arrest. Fourth Amendment privacy rights are measured by an objective standard of reasonableness in light of the historical purpose of the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 177-78 (1984). If on April 21, 1995, the Noble County Sheriff could have taken and tested Timothy McVeigh's clothes for any evidence relating to the charges on which he was arrested two days earlier, no societal purpose is served by precluding the FBI from doing the same thing to seek evidence for its investigation on the

charges for which a court found probable cause to arrest him as a suspect.

In recent cases appellate courts have tended more towards a pragmatic analysis in search and seizure cases rather than the formalistic, formulaic approach taken in earlier times and used by the Fifth Circuit in *Brett* and the dissent in *Edwards*. There is more emphasis on the reasonableness of the police conduct and whether the purpose of deterring misconduct would be served by application of the exclusionary rule in particular factual circumstances. *Arizona v. Evans*, 115 S.Ct. 1185 (1995). Viewed from the perspective of law enforcement agents, there is nothing unreasonable in the FBI accepting custody of the property of the prisoner when they took him from the custody of the Noble County Sheriff and then testing that property in a laboratory. The sheriff testified that he has never been given a search warrant before transferring a prisoner and his property to the custody of other law enforcement agents.

This transfer of custody of Timothy McVeigh from the Noble County Sheriff to the agents of the FBI was lawful because the agents had an arrest warrant from a federal district court. The transfer of his personal property was incidental to the transfer of his person. The opinion deciding *Edwards* would have authorized the Sheriff of Noble County to have sent his prisoner's property for testing for evidence of the crimes for which he was detained. That would have been a reasonable search. There is nothing about the FBI taking the same property and examining it for evidence relating to the crimes for which the federal arrest warrant was issued that transforms what would have been a reasonable search and

seizure by the sheriff into an unreasonable one done by the FBI. A contrary ruling would require the adoption of a sort of sliding scale definition of a prisoner's right of privacy, extending it according to the seriousness of the charges being investigated.

This case is also different from *Brett* and the other cases cited by Mr. McVeigh because the proposed seizure of his property had been judicially reviewed by Magistrate Judge Howland in Oklahoma City, who issued an authorizing warrant before the seizure was effected. The only shortcut taken by the FBI agents in this case was the failure to present a copy of that search warrant to the Noble County Sheriff. That omission can hardly be considered the type of police misconduct that warrants suppression of evidence which is assumed to be otherwise admissible at this stage of the proceeding.

Mr. McVeigh's counsel contend that the mere existence of a search warrant does not justify a search conducted without the use of it, noting that the search warrant signed by Magistrate Judge Howland was returned unexecuted and expired by its terms on April 28, 1995. A *per curiam* decision of the Sixth Circuit Court of Appeals in *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974), has been cited as support for this position. There narcotics agents had developed probable cause for the search of an apartment, dispatched an agent to procure a search warrant, and then, rather than waiting for the warrant, proceeded to forcibly enter the apartment, discovering a quantity of narcotics and related paraphernalia. The government argued an inevitable discovery analysis because a search warrant was later obtained without the use of any information resulting from the

early entry and a thorough search followed. The court found no exigent circumstances justifying a warrantless entry and said that, in the absence of exigent circumstances, police may not force an entry to a home simply because they think they have probable cause.

This court has no disagreement with the result in that case and finds it to be distinguishable because the right of privacy in a home is qualitatively different from the privacy interests of a person lawfully in custody in the clothing and effects in his possession at the time of his arrest. Moreover, in *Griffin* the police acted prematurely – before a judicial evaluation of probable cause. They made their own decision, and the court was concerned that application of the inevitable discovery doctrine would encourage such police shortcuts. Here, judicial approval was given before the seizure.

It is also significant that agent Hupp did not act on his own initiative in taking the property. He was directed by high-ranking officials who had also directed the procurement of the search warrant and knew that it had been issued. Those in command of the investigation had the assurance that they were proceeding with the formal approval of a neutral magistrate. They did not ignore the requirement for a warrant. Seen in context, the FBI sought and obtained a judicial determination of probable cause for the action that it took, and to hold that the results of the laboratory tests could not now be received in evidence simply because no copy of the warrant was exhibited to the sheriff of Noble County, Oklahoma would not only be contrary to established law, it would defy common sense.

Motion to Suppress Statements of Terry Nichols

Terry Nichols claims that all of his statements made to the FBI agents on April 21 and 22 should be suppressed because he was a captive of the FBI, held under coercive circumstances, and did not knowingly and voluntarily waive his Miranda rights.

The government's first response is that an adequate *Miranda* warning was given and a valid waiver of the rights to remain silent and to have the assistance of counsel was made by Terry Nichols before he made any statements of evidentiary interest. In reply, Mr. Nichols contends that his consent was the product of deliberate deception by the FBI in both what they did and did not tell him. The defense asserts that this pattern of deception began when the agents told Terry Nichols that he was free to go; it continued when agent Smith said he would provide a copy of his notes of interview; the agents failed to inform him that the FBI had targeted him as a suspect in the case; they failed to tell him that he was going to be arrested on a material witness warrant; they misrepresented their intentions when they assured him that he or his wife would be present during any search of their residence; they did not disclose that a lawyer had notified them that he was prepared to represent Mr. Nichols and they delayed in taking him before a judicial officer after his arrest. In addition to arguing that the totality of these circumstances requires a ruling that Terry Nichols' statements were involuntary, counsel contends that admission of this evidence would violate the Due Process Clause as well. This aggregation of arguments presents both legal and factual questions requiring separate analyses.

Terry Nichols Statements Were Voluntary

In determining what effect must be given to a state court ruling that a person under interrogation was not in custody for *Miranda* purposes in a federal habeas corpus proceeding, the Supreme Court recently instructed that the "in custody" determination, triggering *Miranda* rights, is a mixed question of fact and law. *Thompson v. Keohane*, 116 S.Ct. 457 (1995). In reaching that result, the Court, through Justice Ginsburg, gave this direction to courts making the "in custody" determination:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."

Id. at 465 (footnote and citation omitted).

The detailed circumstances surrounding the interrogation of Terry Nichols have been set forth above.

Those in command of the investigation, particularly Mr. Shapiro, had instructed that if Mr. Nichols left the station, he was to be placed under close surveillance. They knew that they would seek a warrant for his arrest as a material witness. The agents were not given any explicit instructions as to what they were to do if he left the police station and tried to enter his house. There was,

of course, a continuing concern that explosive devices and booby traps were inside the residence, and it is doubtful that the agents would have permitted Mr. Nichols free access to his property.

Terry Nichols and his wife were effectively under the control of the FBI. The answer to counsel's often repeated question during the suppression hearing is that Terry Nichols was not free to leave the station, get into his pickup truck, drive to his house, go in and sit on the sofa. While there can only be speculation as to the specific action the FBI would have taken if Mr. Nichols had attempted to do these things, it is clear enough that his freedom of action was sufficiently circumscribed to say that he was in a custodial environment.

The extent of that control was not known to Terry Nichols. Indeed, his unawareness of all of the actions taken by the FBI regarding him is the essence of the deception argument. What would a reasonable person in his position have "felt" about his freedom of action? The answer to this question changes over time. In the beginning, there was nothing to indicate to Terry Nichols that he was going to be arrested. He knew from telecasts and broadcasts that Timothy McVeigh had been named as a suspect in the bombing investigation and, presumably, that the FBI and other law enforcement agencies were conducting an extensive and intensive investigation of all possible leads to additional information. He knew that his name had been mentioned as one who had some association with Timothy McVeigh. He knew that many agents were in town, and he could readily conclude that they were there to find him and talk with him. He went to the police station to voluntarily avoid a confrontation

with them – just as he said when he referred to "another Waco." Yet, a reasonable person in his position may well believe that he would be free to go if the agents accepted his statements explaining his activities and his associations with Timothy McVeigh.

As the interview progressed it must have been apparent to Terry Nichols, as it would be concluded by any reasonable person in his situation, that he was not going to be going home with his wife and daughter. Indeed, that is what he was overheard telling her when she came to see him in the basement shortly before 9:00 p.m. It is difficult to fix a definite time when he was in custody under the legal standard of the *Thompson* case; but, certainly that was his status when he acknowledged it by that statement to his wife.

There was a valid *Miranda* warning given before any substantive questioning took place and before any material statements were made by Terry Nichols. For the present purpose, it is assumed that the rights of a person in custody as a material witness are, in this respect, identical with those of a person arrested as a suspect. The question is whether Terry Nichols validly waived his rights and consented to talk without the assistance of an attorney.

Defense counsel argue Terry Nichols' refusal to sign the *Miranda* form and his statement that the word "interrogation" reminded him of the Nazis, coupled with the statement that he did not want another Waco incident, all indicate coercion. In essence, it is claimed that Mr. Nichols went to the police station to surrender himself to the FBI to avoid harm to himself and his family when the

FBI came to get him as he assumed they would. Thus, this defendant is portrayed as a frightened and confused man reacting to the prospect of a confrontation with the awesome power of the federal government under alarming circumstances. The court accepts the view that fear was one of the motivating factors in Terry Nichols' decision to go to the police station and that he was afraid to leave the station on his own. He wanted some protection.

While the question of custodial status must be decided under an objective standard, the voluntariness of a waiver of constitutional protections and an informed, voluntary consent to answer investigators' questions are subjective issues. Thus, the court must determine, on this evidentiary record, whether Terry Nichols made a knowing and voluntary decision to talk with the two teams of FBI agents questioning him during the nine hours that he was in the Herington police station. The short answer to that question is yes. There is nothing in the evidentiary record to contradict the testimony of the interviewing agents that Mr. Nichols was calm and deliberate in demeanor. There were no signs of coercion, such as the display of firearms, or anything other than a conversational tone up to the time of the accusatory confrontation by agent Jablonski just before the arrest. The evidence does not suggest that Mr. Nichols' will was overborne and "his capacity for self-determination critically impaired" during the nine hours that he was in the Herington police station. *United States v. McCullah*, 76 F.3d 1087, 1101 (10th Cir. 1996) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)).

Moreover, the content and tenor of the statements made are entirely consistent with a consent to continue

the interviewing. That aspect of the case is discussed later in considering the admissibility of these statements against the defendant McVeigh under Fed. R. Evid. Rule 804(b)(3) as statements against penal interest.

The court finds from this record that Terry Nichols knew his rights, waived them and did what he could to explain the seemingly suspicious circumstances surrounding him on April 21, 1995. In reaching this result, the court does not make any finding regarding the truth or falsity of the reports of the statements made and the explanations given. Indeed, it is not possible to do so on so limited a record as that now under submission.

There was no deliberate deception in the agents' statements to Mr. Nichols that he was free to go and was not under arrest. They knew that they did not have any authority to make an arrest, and while there was an overall plan for close surveillance, the agents in the police station did not know what directions they would be given if Mr. Nichols had elected to leave.

Agent Smith's response to Terry Nichols' inquiry about the possibility of obtaining a copy of the interview notes does not give rise to any finding that the waiver of rights was conditional. The comment was made when agent Smith was reviewing the notes for the two agents who joined the conversation in progress, as previously noted. Mr. Nichols did not make his request any more specific or say anything to indicate that his continuing to talk was in any way conditioned upon receipt of a copy of the agent's notes. Agent Smith testified at the suppression hearing that in making his response he was thinking that under the discovery rules a copy would be provided

to Terry Nichols as a defendant. The probability is that agent Smith had no specific intention of providing these notes at any particular time and was simply providing reassurance to continue the interview. That does not, however, destroy the voluntariness of the statements made by Mr. Nichols. It is significant that Mr. Nichols continued to want to talk to the FBI agents on the following day when he knew that he was under arrest as a material witness and was on his way to court. There is no testimony that during that time he repeated his request for a copy of the notes.

The agents did not misrepresent their intentions when they told Mr. Nichols that either he or his wife could be present during any consent search. Counsel for the government have accepted the defense position that the consent of Terry Nichols was conditional, and, accordingly, do not seek to justify any of the searches and seizures now in dispute on the grounds of Terry Nichols' consent, independently of that of his wife. As will be discussed, Marife Nichols voluntarily consented to several entries and seizures without making any condition upon them, and her consent was sufficient in itself.

The FBI was not legally required to inform Terry Nichols as to the level of their interest in talking with him. Even if it is assumed that those who were supervising the entire investigation considered him as a probable participant in the crime under investigation, the Supreme Court has held that the validity of a *Miranda* waiver is not dependent upon a fully informed declarant. In *Colorado v. Spring*, 479 U.S. 564, 576 (1987), the Court made a distinction between the voluntary and knowing nature of a waiver as compared with the wisdom of it, citing its

previous opinion in *Moran v. Burbine*, 475 U.S. 412, 422 (1986). In *Patterson v. Illinois*, 487 U.S. 285, 296, n. 8 (1988), the Court noted that the desirability of informing an accused of an indictment can be reasonably debated. The courts of appeals have, since *Patterson*, concluded that such a disclosure is not required. See *United States v. Chadwick*, 999 F.2d 1282, 1284 (8th Cir. 1993), citing cases from the Second, Third, Fourth, Seventh and Ninth Circuits. See also *United States v. Valdez*, 16 F.3d 1324 (2d Cir.), *cert. denied sub nom. Mock v. United States*, 115 S.Ct. 60 (1994) for an extreme case. These authorities also support the conclusion that it was not required that the FBI disclose to the interrogating agents and, in turn, to Mr. Nichols, that a warrant for his arrest had been issued in Oklahoma City.

Mr. Nichols' counsel has argued that if Mr. Nichols had known all of the circumstances surrounding his interrogation he would have made a different choice about talking with the agents. In *Moran*, 475 U.S. at 422, the Supreme Court held that events occurring outside of a suspect's presence and unknown to him, including a telephone call from a lawyer seeking to represent him, have no bearing on the capacity and freedom to waive *Miranda* rights. It is suggested that if Mr. Nichols had been told that the Kansas Federal Public Defender had volunteered to represent him, that the FBI had control of his house and vehicle, and that he was about to be arrested and detained as a material witness because the agents had a strong suspicion of his complicity in the crime, he would at least have asked for counsel and in all probability would have refused to make any statements or answer any questions.

This suggestion is contradicted by Mr. Nichols' conduct on the following day, April 22, when he was taken by agents Smith and Crabtree from Abilene to Wichita for his appearance in court. He then well knew he had been accused of lying to FBI agents; he had been arrested; he was on his way to court and he was aware that he would soon have counsel appointed for him. Nonetheless, he began a conversation with the agents by asking whether the search of his residence had taken place. Upon being told that no search had been done, Terry Nichols reaffirmed his consent by offering further assistance in again describing the location of firearms in his house and expressing the hope that the persons conducting the search would be able to tell the difference between explosive materials and cleaning compounds. This conversation was consistent with what Mr. Nichols had said at the Herington police station. Notably, Mr. Nichols did not say anything to suggest that his earlier consent to search was conditioned by a requirement that he or Mrs. Nichols must be present, and he did not recant or attempt to withdraw or explain any of his earlier statements. He continued his effort to show himself as fully cooperative when he was in the custody of the U.S. Marshal in Wichita by telling deputy Ingermanson that he wanted to see the FBI agents again before going to court.

The most recent discussion of the level of coercion which would make a defendant's confession involuntary in the Tenth Circuit is *United States v. McCullah*, 76 F.3d 1087, 1101 (10th Cir. 1996), in which the court reviewed the relevant authorities. In sum, considering the applicable law and adding all of the suggested coercive factors together, there is no basis for suppression of the Nichols'

statements. The government has borne its burden of demonstrating a knowing and voluntary waiver of *Miranda* rights and that all of the statements in question were made knowingly and voluntarily.

The Arrest Warrant Was Valid

Counsel for Terry Nichols made the general challenge that there was no probable cause for the arrest of Terry Nichols as a material witness and that any statements from him following the execution of the arrest warrant in the first hour of April 22 should be suppressed because of the taint from an illegal arrest. The applicable statute is 18 U.S.C. §3144, the pertinent part of which reads as follows:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title.

The affidavit of Henry Gibbons was presented to Chief Judge Russell as support for the subject arrest. After reciting why the testimony of both James and Terry Nichols is required before the investigating grand jury, agent Gibbons made the following statement:

> Terry Nichols' renunciation of his U.S. citizenship and his association with Tim McVeigh, a person involved in such a heinous crime, indicates that his testimony cannot be secured through the issuance of a subpoena.

(Ex. 22).

The burden on the government under the statute is to show probable cause to believe that it is or *may be impracticable* to rely on a subpoena to get the witness before the grand jury. Two federal district judges, Chief Judge Russell in Oklahoma City, and Judge Monti L. Belot in Wichita, Kansas, found Mr. Gibbons' affidavit to constitute an adequate showing.

The reference on the face of the warrant to an attempt to flee the jurisdiction of the United States was mistakenly copied from the face of the Ahmed arrest warrant. That reference is not in the supporting affidavit for the Nichols warrant and is not a part of the showing of probable cause. The defense has not discredited the affidavit, and upon examination of it, this court joins Judges Russell and Belot in finding it sufficient under the statute.

There Was No Denial of Due Process

As a separate argument for suppression of Terry Nichols' statements, counsel argues that Mr. Nichols was denied due process of law because he was denied the right to a meaningful hearing in a timely manner. Counsel cite *Mathews v. Eldridge*, 424 U.S. 319 (1976), a case involving denial of social security disability benefits. Recognizing that Mr. Nichols did receive a hearing before Judge Belot, with the benefit of appointed counsel on April 22 and continued to April 26, the defense argues an unreasonable delay before the FBI took him before the court in Wichita. *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). Assuming that the rights of a person arrested as a material witness under 18 U.S.C. §3144 are the same as an

arrested suspect, there was no violation of those rights in this case. There is no constitutional right to be arrested as soon as probable cause for an arrest has been shown. *Hoffa v. United States*, 385 U.S. 293, 310 (1966); *United States v. Beltran*, 917 F.2d 641, 643 (1st Cir. 1990); *United States v. Toro*, 840 F.2d 1221, 1233-34 (5th Cir. 1988). In *United States v. Drake*, 655 F.2d 1025, 1027 (10th Cir. 1981), the court cautioned that agents may not delay an arrest to gain a tactical advantage. Here, the delay was to permit the voluntary interview, a purpose recognized as valid in *Hoffa*. There was no unreasonable delay in holding the initial appearance at Wichita on the same day as the arrest. The transfer to Oklahoma City was delayed at the request of Mr. Nichols counsel for a stay of the removal order. (Ex. 35 at p. 62-64).

Residence Searches

A comprehensive search of the Nichols' residence on April 22, 1995, was done with the approval of a search warrant issued by U.S. District Judge Belot in the District of Kansas at 11:20 a.m. on April 22. The defense challenges the validity of that warrant by attacking the supporting affidavit of agent Scott Crabtree because he included the observation of agent Reightler, distorted the statements of Terry Nichols and included a statement that agents noted an odor of fertilizer at the residence.

At paragraph 19 of his affidavit, agent Crabtree reported the observation made by agent Reightler as follows:

> While Nichols was being interviewed, he gave consent for agents to search his residence and

> his pickup. Due to imminent darkness and safety concerns, the agents elected not to search the house at that point. However agents did go to the property and observed four fifty-five gallon plastic drums in Nichols's garage. Two of the drums had blue plastic lids which resembled the plastic fragments found during the bomb scene analysis in Oklahoma City. In addition agents noted a strong odor of fertilizer near the garage.

Defendant Nichols contends that when agent Reightler looked into the garage window on the night of April 21 he made a warrantless intrusion into the curtilage in violation of the Fourth Amendment because there were no exigent circumstances. Agent Reightler testified that he thought he was acting with consent of the property owners. The government has conceded that Terry Nichols' consent was conditioned upon a requirement that he or his wife must be present at the time of search.

Marife Nichols gave her unconditional consent to a search of the residence. The defense contends that her consent was involuntary because of the coercive circumstances surrounding her at the Herington police station.

A finding of a free and voluntary consent to search under the totality of the circumstances requires the government to proffer clear and positive testimony that consent was unequivocal, specific, and freely and intelligently given without implied or expressed duress or coercion. *United States v. McRae*, 81 F.3d 1528, 1536-37 (10th Cir. 1996). *See also United States v. Angulo-Fernandez*, 53 F.3d 1177, 1180 (10th Cir. 1995). For the reasons set forth below, the court finds that Marife Nichols' consent

was valid. Agent Reightler's two looks into the window did not violate the Fourth Amendment rights of Terry Nichols. Even assuming agent Reightler's observation was made in a violation of the Fourth Amendment, deleting it from the affidavit has no significant effect on a determination of probable cause.

The defense asserts that agent Crabtree misrepresented and distorted the statements the agents heard from Mr. Nichols. These statements are paraphrased in paragraph 17 of the Crabtree affidavit. Subparagraph (d) reads as follows:

> Nichols admitted that he knows how to make a bomb by blending ammonium nitrate with diesel fuel, which he stated could be detonated by either blasting caps or dynamite. Nichols also stated that he had ammonium nitrate at his residence until Friday, April 21 at which time he placed it on his yard as fertilizer. Nichols said that he did this after reading (in several different newspapers) that ammonium nitrate was used in the Oklahoma City bombing.

(Ex. 19).

The agents' 302 report related that Terry Nichols said he had been at a gun show in Tulsa next to an individual who had a booth selling items related to explosives; that Mr. Nichols had discussed bombing literature; that he said a farmer had related blowing tree stumps using ammonium nitrate and diesel fuel in a mixture and that someone at a gun show had talked of mixing it for explosions involving quarry/rock work. The agents also reported that when questioned about first-hand knowledge, Mr. Nichols said "I have not made any, so I do not

know if the mixture stays granular or becomes liquid", and that he assumed that electric blasting caps could be used for detonation. They also reported that Mr. Nichols said he had ammonium nitrate that he was going to sell at gun shows in small packages with accompanying instructions for use as plant food, and that he put the remainder of it on his lawn that morning and had not mentioned that earlier to the agents because it would "make me look guilty to a jury." The quoted language from the affidavit is not such a distortion of these statements as would change the import of them.

In subparagraph (e), agent Crabtree said:

> Nichols also said that he had a fuel meter in his garage. He stated that he purchased this item for resale purposes.

(Ex. 19). In their 302 report, the agents related that Mr. Nichols advised that he had bought a fuel meter at Fort Riley with the intention to sell it and paid only a percentage of the original price. The agents testified that Terry Nichols told them that the fuel meter was inoperable. The failure to include that statement does not change the significance of this item in the affidavit. In reviewing an affidavit to determine probable cause for a search for evidence, the judicial officer may consider suspicious circumstances. The presence of a fuel meter in Terry Nichols' garage, whether in working condition or not, is such a circumstance. The fact that Mr. Nichols said that the fuel meter was not operable on April 21 does not preclude the possibility that it was in working order in Mr. Nichols' possession at some earlier time. A judge may be somewhat skeptical of such explanations where the aggregate of the information gives rise to a probability

that a search may reveal some evidence concerning a crime.

Comparing the agents' testimony and their 302 report about Terry Nichols' statements with the recitals in the Crabtree affidavit, the court finds no significant differences. If the Crabtree affidavit had been identical with the agents' 302 report and testimony about what Mr. Nichols told them, there would be probable cause for the search for evidence based upon all of the information provided, which included material from other sources.

Another challenge to agent Crabtree's affidavit is that he "shaded the truth" when he said that agents noted a strong odor of "fertilizer" near the garage. Agent Reightler testified that he smelled an "ammonia-type" odor. The defense presented evidence that ammonium nitrate fertilizer does not have such a smell. The court need not decide this point because the reference to the smell of fertilizer in the Crabtree affidavit is not necessary for a finding of probable cause, given the other information provided to Judge Belot within the four corners of the document.

A search was conducted on the morning of April 23 at the Herington residence of Mr. and Mrs. Nichols. It was done with the consent of Marife Nichols and, because she was with the agents in the house, it was also consistent with the condition imposed in the consent given by Terry Nichols.

Another search warrant was issued in Kansas on April 29, 1995. While no evidence was recovered, the agents observed a Mikita drill and drill bits which became the objects of another application for a search

warrant on May 2, 1995. Accordingly, the validity of the April 29 search has been challenged, principally upon the same grounds as offered against the earlier warrant and the same ruling is applicable. The drill and drill bits were recovered on May 3, 1995, as a result of a warrant issued on the previous day. Again the only flaws in that affidavit would be those previously argued in the earlier warrants.

There were many additional entries into the Nichols' residence, all based on the consents given by Marife Nichols during the days she was with agents Thomeczek and Dobson. While it is not clear on the present record whether the admissibility of any evidence is dependent upon the validity of those searches and seizures, it is appropriate now to rule on the issue of those consents to avoid possible delays during trial.

Marife Nichols Gave Valid Consents to Search

The defendant Nichols suggests that from the time FBI agents Thomeczek and Dobson, together with CID Agent White, went to Abilene with Mrs. Nichols to the time she boarded a bus to California en route to her return to her homeland, this young Filipino woman was in the custody of federal agents and held incommunicado with the sinister purpose of getting her to consent to these searches and to make statements incriminating her husband. The government counters that the agents acted as assigned companions to support and protect Marife Nichols and her young daughter because they had no other support for their subsistence. The truth appears to be somewhere in between these versions.

There was a legitimate law enforcement purpose to keep Mrs. Nichols out of her house during that first weekend, April 22-23. The news media coverage of the investigation was extensive in scope and intensive in focus on all persons who were subjects of FBI interest. Moreover, at least before the warranted search conducted on April 22, the agents had reason to suspect that there may be some hidden danger within the property, perhaps unknown to Mrs. Nichols. The decision to exclude her from the residence during that first weekend was a reasonable response to the known and unknown circumstances.

The most disturbing fact is the withholding of Marife Nichols' money for more than 30 days. The first excuse given by the agents in denying her request for her money was that they wanted to test the items for Timothy McVeigh's fingerprints. The record does not disclose whether or when any such test was made. Thirty days is more than enough time to complete the necessary procedure. Moreover, there is no apparent reason that the FBI could not have paid her $5,000 and retained the particular bills. The submitted evidence did not include any information as to the method of payment when Mr. Woods was able to persuade the government to release $4,800. The arguable inference is that knowing that this money was the only resource Marife Nichols had to pursue her plan to return to the Philippines, the FBI held it hostage to force her cooperation in the investigation.

Another disturbing issue is that the government lawyers misused a grand jury subpoena to question Marife Nichols in the United States Attorney's Office in Oklahoma City on May 9. Apparently another attempt was

going to be made with a second subpoena ordering her back to Oklahoma City on May 16. Mrs. Nichols was finally released to go her own way when the government's lawyers decided that any testimony from her would not be helpful to them.

Terry Nichols' lawyers suggest additional improprieties color the government's conduct in darker hues. They point out that no one offered to provide counsel to advise Mrs. Nichols and that she was never told about the marital confidential communications privilege or that she had a spousal privilege to refuse to testify against her husband. See *Trammel v. United States*, 445 U.S. 40 (1980). That in itself did not invalidate any of her statements or consents because these privileges are evidentiary rules of exclusion and do not have a constitutional foundation.

These matters do not rise to constitutional dimensions. The legal conclusion to be drawn from all this is that even assuming bad faith and misconduct by these government agents and lawyers, there is no basis for the extreme sanction of suppressing any admissible evidence derived directly or indirectly from it. Taken as a whole, the evidence now before this court does not support a finding that Mrs. Nichols was coerced into cooperating or that her consents were not voluntary under the applicable legal standard.

Having listened to the testimony of Marife Nichols as a witness at the suppression hearing and observing her demeanor on the stand, the court finds and concludes that despite her young age and her family background and living circumstances in the Philippines, Marife Nichols had the capacity to control her choices of action

and freely exercised it in dealing with these FBI agents. The fact that she was separated from her husband did not prevent her from exercising her free will. Indeed, the court is struck with the fact that nothing in the testimony indicated that she asked about the welfare or circumstances of Terry Nichols. Her constant and consistent interest was in getting her money and getting back to the Philippines. Apart from the retention of the funds, the government made no effort to prevent that from happening. She did contact representatives of the Philippine government and her own relatives as well as Mr. Nichols' family. While much is made of the government requirement that she consent to recording conversations by telephone with Terry Nichols and his family, she was left alone to contact anyone she wanted to, and the persons with whom she did communicate gave no assistance to her and left her to her own devices.

Marife Nichols voluntarily consented to searches of her residence and the pickup truck, without any qualifications, on April 21, 1995, at the Herington police station. She was then sufficiently aware of the FBI's interest in her husband and his activities to know that such searches could have serious consequences. Her decision was based on her belief that there was nothing to hide. She asked reasonably and appropriately whether she had the authority to consent to search property owned by her husband. The agents told her that he would be asked for his consent as well and, indeed, he gave it.

On that Friday afternoon and evening, Marife Nichols had no reason to believe that events would unfold as they did. She could reasonably expect that she would soon have her money and be on her way to the

Philippines. There were no coercive circumstances surrounding her signing the original consent to search forms, and she did not qualify her consent. (Ex. 14-A & 14-B). All of the subsequent consents were an extension of this original choice and each was for a particular identified purpose. Having once given a general consent, it would appear to her that any subsequent refusal of a specific request would be interpreted as an attempt to hide or conceal something and her principal motivation, as she testified, was to show that she had nothing to hide.

Marife Nichols is not a person who is in awe of authority. She falsified documents necessary to her marriage and entry into the United States by misrepresenting her age. She demanded on at least two occasions to talk to the supervisors of agents Thomeczek and Dobson to assert her rights. She demonstrated by her demeanor on the witness stand and her answers to cross-examination by government counsel at the suppression hearing that she has a command of the English language, a knowledge of her basic rights, and a willingness to assert them. In the calculus of voluntary consent the issue is whether there was a free choice – not whether the consent was motivated by a desire to be helpful to the investigation.

Over all, the conclusion is that after the arrest of Terry Nichols, the government assigned agents to Marife Nichols as companions with the primary purpose of protecting her welfare, and their conduct toward her did not override her freedom to decide whether to consent to any searches and seizures or to talk with them.

Government's Motion *In Limine* Regarding Statements of Terry Nichols

Testimony at trial from FBI agents relating what Terry Nichols told them is inadmissible hearsay as to defendant Timothy McVeigh, if offered for the truth of the matters asserted, unless the prosecution can fit them within a well-recognized exception to the hearsay rule and the statements are shown to be sufficiently reliable to satisfy the Confrontation Clause of the Sixth Amendment to the United States Constitution. The government filed a motion *in limine* seeking a pre-trial ruling that some of these statements constitute admissible evidence against Mr. McVeigh because they were made as statements against Terry Nichols' penal interest. Rule 804(b)(3) provides, in pertinent part, that if the declarant is unavailable as a witness, the hearsay rule does not exclude "A statement which at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. R. Evid., Rule 804(b)(3). Some of the papers filed in support of and opposition to this motion were sealed to avoid any possible prejudicial effect of pre-trial publicity regarding such statements. Closure of this part of the clerk's file is necessary to prevent widespread publicity about reports of statements made by Mr. Nichols which will not be received as trial evidence in support of charges against Timothy McVeigh.

The government recognizes that many of the statements attributed to Terry Nichols by the FBI agents who talked with him on April 21 and April 22, 1995, are not

within this limited exception to the hearsay rule. Government counsel contend that agents' testimony as to three "core admissions" come within the exception. These are statements concerning: (1) a meeting with Timothy McVeigh in Oklahoma City and driving him to Kansas on April 16; (2) loaning a truck to Mr. McVeigh in Junction City, Kansas on April 18 and (3) the removal of items from a storage locker in Herington, Kansas on April 20. These statements are summarized in agent Crabtree's affidavit for a search warrant. (Ex. 19).

The initial requirement for admissibility of statements against penal interest is that the declarant is not available as a witness. The definition of unavailability in Rule 804 includes a situation in which the declarant is exempt on the ground of privilege from testifying. Terry Nichols has that privilege. The government has no power to call him as a witness without a waiver or a grant of immunity. He is not now a witness available to the prosecution.

Both sides have cited the same case, *Williamson v. United States*, 114 S.Ct. 2431 (1994), in support of their contradictory positions about the applicability of Rule 804(b)(3) to testimony concerning these statements of Terry Nichols. That anomaly results from their conflicting readings of the plurality opinion authored by Justice O'Connor. When considered with the concurring opinion by Justice Ginsburg, joined by three other justices, and the separate concurring opinion of Justice Scalia, the holding of six justices was that application of this exception to the hearsay rule requires a fact-intensive inquiry and that only statements truly inculpatory of the declarant may be admitted. The statements must be analyzed

separately, particularly where there is a mixture of inculpatory and self-serving statements in a narrative. The Court remanded the case for further proceedings.

The Fifth Circuit, in turn, remanded the case to the trial court "for further proceedings consistent with the Court's opinion." *United States v. Williamson*, 47 F.3d 1090 (11th Cir. 1995). That was a daunting task, considering that two justices directed a review of the record under Justice O'Connor's direction; three justices directed a review of the record under Justice Kennedy's direction in his concurring opinion and three justices joined Justice Ginsburg's instruction to make a harmless error analysis.

The government's contention is that the core statements attributed to Terry Nichols are self-inculpatory because they put him with the person under suspicion at the place of the bombing, Oklahoma City, on April 16 and at a place believed to be related to the crime one day before the bombing. While Mr. Nichols did not admit any criminal conduct, the government contends that these admitted acts become criminally significant in the context of what the prosecution intends to prove at trial. Thus, this case is said to be analogous to the hypothetical case posited by Justice O'Connor as follows:

> Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest. "I hid the gun in Joe's apartment" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. "Sam and I went to Joe's house" might be against the declarant's

> interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy.

Williamson, 114 S.Ct. at 2436-37.

The initial difficulty with this contention is that the court does not have the other evidence before it and may not speculate about what may be proved at trial as to Mr. McVeigh. Next, there is nothing to support any inference that Terry Nichols knew what information the FBI had about Timothy McVeigh on April 21, apart from the knowledge that he was being arrested on charges relating to the bombing. Finally, the significance of this hypothetical in the plurality opinion is greatly attenuated by the concurring opinion of Justice Ginsburg, expressing the view that in the case before the Court the arguably inculpatory statements were so closely intertwined with self-serving declarations as to make them untrustworthy. She further observed that under *Lee v. Illinois*, 476 U.S. 530 (1986), persons under arrest have a strong incentive to shift blame to others, making their statements presumptively suspect and requiring the scrutiny of cross-examination under the Confrontation Clause.

In *United States v. Costa*, 31 F.3d 1073 (11th Cir. 1994), the Eleventh Circuit interpreted the *Williamson* case to require the trial court to make a fact intensive inquiry into all of the surrounding circumstances to determine whether a statement is truly against interest. The court reversed the trial court's use of Rule 804(b)(3), holding the questioned custodial confession was not genuinely against the declarant's interest to the extent that it directly inculpated the defendants in a conspiracy.

The underlying premise for admissibility under Rule 804(b)(3) is that a reasonable person in the declarant's position would recognize that his statement so far tended to subject him to criminal liability that he would not have said it unless he thought it was true. The starting point for this analysis is to determine whether a reasonable person in the position of Terry Nichols at the Herington police station on April 21, 1995, would believe that these statements would tend to subject him to criminal liability. The crime in question is the suspected bombing of the Murrah Building in Oklahoma City on April 19. As set forth in the earlier findings, Terry Nichols voluntarily went to the Herington police station and agreed to talk with FBI agents to find out why he was being mentioned on television and radio broadcasts concerning the investigation of that bombing.

None of the statements under consideration is a direct admission of any criminal conduct by Terry Nichols as to that or any other event. None of the statements directly implicates Timothy McVeigh or shows that Terry Nichols assumed or thought that Mr. McVeigh was guilty of any crime.

Terry Nichols said that he had heard that Timothy McVeigh was being arrested in connection with the bombing investigation. When asked questions about his opinion as to whether Timothy McVeigh was involved, Terry Nichols gave varying responses. At one time he said that he could not believe that it was Timothy McVeigh, because when they met in Oklahoma City, it was because Mr. McVeigh's car broke down on his way back east to see his family. He also said that Mr. McVeigh expected to get an inheritance soon from his family and

that he, Mr. Nichols, could not see why Mr. McVeigh would do it. When he was apparently pressed on the matter and began to speculate as to the possibility that Mr. McVeigh was involved, Terry Nichols coupled his statements with complete denials of any awareness of or involvement in such activities. After saying that he did not know anything about the bombing, Terry Nichols professed his concern about his statements being misunderstood, saying that "in my eyes, I did not do anything wrong but I can see how lawyers can turn stuff around." At another time, after being asked whether he thought Timothy McVeigh was involved, Mr. Nichols reportedly said, "I feel upset that I am involved, in a sense, because of him, and knowing that I am not."

To grant the government's motion, the court must find that Mr. Nichols had the knowledge about the bombing that the government assumes to make his statements admissible – that is that Timothy McVeigh was a guilty participant in the crimes charged in this case. That finding would be unwarranted speculation from the evidence now before this court.

There are six general possibilities: (1) both Timothy McVeigh and Terry Nichols were among the perpetrators of these charged offenses; (2) neither of these defendants was involved; (3) Terry Nichols was a participant and Timothy McVeigh did not know it, [sic] (4) Timothy McVeigh was a participant and Terry Nichols did not know it; (5) Terry Nichols was a participant and Timothy McVeigh knew it and (6) Timothy McVeigh was a participant and Terry Nichols knew it. There may be other possibilities depending upon the number of participants and varying levels of knowledge.

Only the first of these six possibilities definitely supports admissibility against Timothy McVeigh of these reported statements of Terry Nichols – the assumption that he and Timothy McVeigh both had some participation in the bombing. Any such finding at this time would be nothing more than sheer speculation and conjecture. The last of the six possibilities – the assumption that Timothy McVeigh was a participant and Terry Nichols knew it, – could cause a reasonable person with such knowledge to think that statements putting him with a perpetrator near the time and place of the explosion may tend to expose him to prosecution. However, the agents' reports and testimony do not provide a basis for finding that Terry Nichols had such knowledge about Timothy McVeigh or even thought him to be guilty.

Even if such knowledge is assumed, this testimony must be rejected as hearsay because the statements argued to be against penal interest are so intertwined with those that are self-serving that separation is not possible. The government says that it has evidence proving Mr. Nichols' explanatory and self-serving statements false; but it has not proved that the inculpatory statements are true. An inherent difficulty with evidentiary rulings on motions in limine is that the court does not have the benefit of viewing the disputed testimony in the context of other evidence.

On the present record, the court finds that, as a reasonable person, Terry Nichols did not expect that his statements to the agents would result in his being charged with some complicity in this crime. Quite to the contrary, the probability is, from all of the attendant circumstances, that Terry Nichols knew that he was under

suspicion because of his association with the primary suspect and that it was in his self interest to initiate contact with the FBI to explain away anything that might be considered incriminating of himself.

Government counsel ask whether there would be any reason for Terry Nichols to place himself with Timothy McVeigh in Oklahoma City on Easter Sunday and in Junction City on Tuesday, April 18, if these statements were not true. The answer is that there are several possible scenarios which are contrary to the assumption that these must be true statements because they tend to implicate Mr. Nichols in criminal activity.

Mr. Nichols may have surmised that the FBI had information putting him in Oklahoma City on Easter Sunday and putting his truck in Junction City, Kansas two days later. If it is assumed his statements that Mr. McVeigh was present at those times and places are false, the reasonable inference is that Terry Nichols was trying to transfer full responsibility to Timothy McVeigh, supporting the government's case against the arrested suspect to gain favor or to explain away any suspicion of himself. Counsel for Timothy McVeigh have noted how deftly some of the denials attributed to Terry Nichols implicate Mr. McVeigh, particularly in the context of what Mr. Nichols stated about their past activities together. The historical narrative of their previous relationship is clearly inadmissible hearsay.

Another possibility is that the complete narrative told by Mr. Nichols is entirely true, including the innocent purpose for him meeting Timothy McVeigh in Oklahoma City on April 16, the innocent purpose in loaning

the truck to Mr. McVeigh in Junction City on April 18 and the innocent purpose in cleaning out the storage locker in Herington on April 20. Taking the reported statements of Terry Nichols as true in their entirety, they are consistent with either of two possibilities: (1) that neither of these two defendants had any involvement in the bombing or (2) that Terry Nichols had no awareness of or knowing participation in any involvement on the part of Timothy McVeigh.

The only circumstances shown by the evidence is that Terry Nichols voluntarily went to the Herington police station to find out why he was being mentioned on television and radio in connection with the investigation of the Oklahoma City bombing and, perhaps, to avoid potential dangers from possible confrontations with law enforcement agents, news media or an alarmed citizenry. He knew that the government was in the process of arresting Timothy McVeigh for some participation in the bombing of a federal building in Oklahoma City on April 19, and Terry Nichols knew he was under some degree of suspicion because of his past association with Mr. McVeigh. That is not enough to support a finding that these statements were against Mr. Nichols' penal interest.

The government has failed to satisfy the first requirement for application of this hearsay exception – that Terry Nichols made these statements as admissions tending to expose him to criminal liability.

Not only does the proffered testimony fail to meet the established criteria for admissibility under the exception, admitting these statements without cross examination would violate the Confrontation Clause of the Sixth

Amendment. The law is well established that the right to cross-examine one's accusers is a vital and indispensable part of the right to trial, unless there are valid reasons why the witness is not available at trial, and there are such clear indicia of reliability of the statements as to be a functional substitute for testing the truthfulness of the statements in that time-honored method.

Counsel for the government are very selective in what they want the trier of fact to believe about what the FBI agents say that Terry Nichols told them. The statements offered as admissions are only those that fit into the prosecution scenario. The interrogating agents did not themselves believe most of what they said they heard from Terry Nichols. Agent Foley testified that "I believe Mr. Nichols wanted to tell us a story that night, which he did." (Tr. at 526). He acknowledged that taking one part of the 302 report from the rest of it can give a false impression. (Tr. at 530). Agent Jablonski gave his opinion in the following colloquy in response to Mr. Jones on cross-examination:

> Q. Now, you also indicated in response to questions by Mr. Tigar that you formed the opinion that Terry Nichols wanted to be there.
>
> A. That is correct.
>
> Q. By there, you mean at the Herington police station?
>
> A. I don't know if he particularly wanted to be at the Herington police station, but I believe he sure wanted to talk.
>
> Q. Okay. What do you mean by that, that he wanted to be there? You didn't say he wanted to

talk. You said Terry Nichols wanted to be there. What do you mean by that?

A. That's what I meant. He wanted to talk. He wanted to find out as much from us as he could about this situation, I felt, based upon my experience in interviewing lots of people.

Q. Okay. did [sic] you think he was lying to you?

A. Yes, I did.

Q. Okay. Did you think he was making a lot of self-serving statements?

A. Definitely.

Q. Did you think he was trying to lead you astray?

A. Yes, and no.

Q. Do you think he was trying to point the finger at somebody else?

A. He was talking about somebody else but talking about his relationship with that other individual.

Q. That's not what I asked you. I asked you if you thought he was pointing the finger at somebody else.

A. He was pointing the finger at someone else but involved himself in that process.

Q. And was that someone else Tim McVeigh?

A. Yes, sir.

Q. But the literal answers he gave which you say involved himself were cast in an innocent explanation, weren't they? It was you that inferred they were inculpatory?

A. That is correct.

To admit only those portions from the interview that the government argues are within Rule 803(b)(4) puts statements out of context and would lead the jury astray just as agent Jablonski said he thought Terry Nichols attempted to do with the agents during the interview. When the declarant on the same occasion makes both inculpatory and exculpatory statements, the opportunity to cross-examine becomes an imperative both under the Sixth Amendment and for the fundamental fairness necessary for due process of law.

RESERVED RULING

After the evidentiary hearing on the motions to suppress, counsel for Terry Nichols moved to supplement the record to add Exhibit W-83, containing an excerpt from a summary of telephone records prepared by the FBI, suggesting that they showed that someone had been using the telephone inside the Nichols residence during the afternoon and evening of April 21 or, alternatively that there were fundamental flaws in the phone records which supported government's Exhibit 64. The government objected. The motion was granted at the oral argument on July 15 and the court granted the government an opportunity to supplement the record with affidavits. On July 19, 1996, the government submitted supplemental exhibits 85 through 90 to provide additional information and explanation of the records. Mr. Nichols filed a response on July 25 and the government filed a reply on August 7. Considering these papers, the court is unable to make any finding as to either of the suggestions raised

by defense counsel. The court will not delay ruling on these suppression motions by reopening the hearing to take additional evidence on this collateral issue which was not timely raised. Even if it is assumed that someone was in the house and used the telephone, there is nothing to suggest that any evidence or information relevant to the issues now being considered was obtained. There is nothing to show any taint resulted from any supposed intrusion. Any ruling as to the accuracy or reliability of the disputed records is reserved for trial.

Upon the foregoing, it is now

ORDERED, that the defendants' motions to suppress are denied and the government's motion in limine seeking admission of testimony concerning statements of Terry Nichols as evidence against Timothy McVeigh under Fed. R. Evid. 804(b)(3) is denied.

Dated: August 14th, 1996

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch,
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 96-CR-68-M

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY JAMES McVEIGH and
TERRY LYNN NICHOLS,

Defendants.

ORDER DENYING DALLAS MORNING NEWS' OBJECTION TO SEALING OF DEFENDANT NICHOLS' MOTION TO SUPPRESS

(Filed Aug. 28, 1996)

The issues in the Objection of the Dallas Morning News, filed on May 22, 1996, having been resolved by the Memorandum Opinion and Order, dated August 14, 1996, it is

ORDERED that the Dallas Morning News' Objection to Sealing of Defendant Nichols' Motion to Suppress is denied.

DATED: August 28, 1996.

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch,
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY JAMES McVEIGH and
TERRY LYNN NICHOLS,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motions: Volume III)

Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 9:00 a.m., on the 3d day of October, 1996, in Courtroom C-203, United States Courthouse, Denver, Colorado.

**Proceeding Recorded by Mechanical Stenography,
Transcription Produced via Computer by
Paul Zuckerman, 1929 Stout Street, P.O. Box 3563,
Denver, Colorado, 80294, (303) 629-9285**

* * *

RULING RE UNSEALING OF
SEVERANCE MOTION MATERIALS

[p. 339] THE COURT: All right. Well, when the objections were filed, I considered them, and I have kept

them in mind as we've gone alone; and certainly **Press Enterprises II** does give us the law and the requirements as I've interpreted them in previous rulings here.

But I think that it is important to recognize that if the – if the motions for relief from prejudicial joinder are granted and if there were to be a trial of the defendants separately, it is clear that by my previous ruling that the – some of the material and clearly the statements made by Mr. Nichols on April 21 and 22 are not admissible against Mr. McVeigh; therefore, on a separate trial for Mr. McVeigh, those statements would not be a part of the evidence.

So that, Mr. Kelley, makes this a matter of concern. As you pointed out, you don't have cases where the court is closing evidence that will be admissible. It wouldn't be admissible against Mr. McVeigh, that is.

The second thing is that the parties have submitted here – and those portions have been sealed – their submissions include not only statements with regard to what may be offered in evidence but also statements of appraisals by counsel of their view of the evidence and the effect of the evidence.

Now, that's quite a bit different from just revealing what's in discovery. That's sort of like work product. In [p. 340] fact, it is work product; and in a sense, all counsel in the case have waived work product to the extent necessary to make clear to the Court what they anticipate the evidence at trial to be and what they anticipate the effect of the evidence to be. Now, that's certainly not something that should be disclosed publicly.

My ruling on these motions will be one in writing in which the result will be explained in considerable detail and in which this Court's exercise of its discretion will be explained, I'm sure, in ways where those who take the time to read it will understand it. And the premise of **Press Enterprises II** is that the courts must function in public so that the public has an opportunity to see the adjudicative process and to draw their own conclusions with respect to the quality of the process.

And my ruling, I believe, will provide just that opportunity and will explain what I rely upon, because some of the material that has been submitted may not be relied upon; and the parties' respective positions on these motions, as – and they have been fully explained in the argument here. So I'm overruling these objections; and what has been sealed will remain sealed until any further order of the Court.

Now, we have as the next item under our scheduling here discovery motions, and there are a number of them. We do also have as a separate item a motion to quash subpoenas.

* * *

[p. 353] Looking down here at notes, I noticed, Mr. Kelley, you still – yes, you're still here. I should make it clear on the record and I appreciate your bringing it to my attention: Exhibit 72 is still sealed; and it's really sealed for the same reasons that I've already articulated with respect to some of the other parts of these motions that are sealed, briefing on the motions.

So it's sealed until some further stage of the proceeding, if it arises, when it can be unsealed.

All right. We'll recess till 1:45. Take a little bit longer today. 1:45.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Criminal Action No. 96-CR-68-M

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY JAMES MCVEIGH and
TERRY LYNN NICHOLS,

Defendants.

MEMORANDUM OPINION AND ORDER
FOR SEPARATE TRIALS

(Filed Oct. 25, 1996)

MATSCH, Chief Judge

The Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, was destroyed by an explosion on April 19, 1995, killing and injuring many people. Timothy McVeigh and Terry Nichols have been joined as co-defendants in an indictment, containing 11 counts, charging offenses alleged to be connected together as parts of a common scheme or plan to bomb that building. This joinder of defendants and offenses is appropriate under Fed.R.Crim P. 8. Each defendant has moved for separate trials claiming prejudice under Rule 14, which provides as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of

> defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

These motions have been fully briefed and evidence was submitted at a hearing beginning on October 2, 1996. The parties filed additional papers under seal because they refer to discovery material and include attorneys' assessments of that material and statements of their respective positions in anticipation of a trial. The court has reviewed the sealed material *in camera* as permitted under Rule 14 and finds that the sealing meets the criteria set out in the Memorandum Opinion and Order on Media Motions issued January 24, 1996. *United States v. McVeigh*, 918 F. Supp. 1452 (D. Colo. 1996). While the sealed material has been helpful to establish context, the factual bases for the findings and conclusions supporting this order are fully disclosed in this memorandum opinion.

The most significant sealed documents are FBI reports of statements made by defendant Terry Nichols to FBI agents during a nine hour interview on April 21, 1995 at the police station in Herington, Kansas. These reports (including agent notes in sealed Exhibit 72) were reviewed during the hearing on Mr. Nichols' motion to suppress agents' testimony about his interview and the government's motion *in limine* for an evidentiary ruling

that testimony concerning some of the statements is admissible against both defendants. This court denied the Nichols motion to suppress and the prosecution motion *in limine* in the Memorandum Opinion and Order on Motions to Suppress Evidence and Regarding Admissibility of Statements of Terry Lynn Nichols issued August 14, 1996. *United States v. McVeigh*, ___ F. Supp. ___ (D. Colo. 1996), 1996 WL 478771. The most pertinent statements were paraphrased in the record of that hearing and were described in that opinion.

The Advisory Committee Notes published with Rule 14 when it was adopted in 1944 observed that it was a restatement of existing law that severance and other similar relief is entirely in the discretion of the court. The Advisory Committee Note to the 1966 Amendment observed: "A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand." The Note further explained the need for *in camera* inspection of such statements to aid in determining whether the possible prejudice justifies ordering separate trials.

The appellate courts have attempted to guide trial courts in opinions reviewing joint trials of defendants after denial of motions to sever. These opinions reveal the obvious advantage in hindsight. An appellate court can measure the extent of any actual prejudice from a joint trial by analyzing a complete trial record. Ruling on a Rule 14 motion before trial requires the trial judge to anticipate the evidence and events of a future trial. The presumed benefits of a joint trial must be weighed

against the potential for harm to the integrity of the trial process.

Trials, like all human events, are unpredictable. All of the participants interact in a public process, which, in essence, is an historical inquiry into past events to determine whether the prosecution has proved the defendants guilty of the crimes charged within the rules of evidence and the applicable law. The frailties of human nature require some constraints on the procedures used to achieve an acceptable outcome. In some cases, a court may proceed with a joint trial and take remedial action when actual prejudice occurs. Even risk of a mistrial or reversible error may be acceptable under certain circumstances. This is not such a case. The nature and scope of the charges, the quantity of the evidence and the intensity of the public interest in all aspects of this criminal proceeding compel caution and restraint in ruling on these motions. The question they present is whether separate trials are necessary to provide such fundamental fairness as will ensure confidence in the outcome of the trial process.

Each defendant is entitled to a jury's separate and independent evaluation of the evidence received against him in any trial, regardless of the number of other persons alleged to have participated in the crimes charged. When two defendants are tried together, the court routinely instructs the jury accordingly and requires them to return separate verdicts. The court commonly cautions the jurors that, in reality, two cases are being tried simultaneously and their findings as to one defendant must not control the decision as to the other defendant. Multiple defendants may be tried together when there is sufficient

common evidence or when there is direct evidence showing the different, but connecting roles of each defendant. It is more difficult to conduct a joint trial when the prosecution must rely on indirect and circumstantial evidence to identify the perpetrators of a crime. When the court believes that such separate consideration is not reasonably to be expected, separate trials must be ordered.

To obtain a severance under Rule 14, a defendant must show either a "serious risk" of actual prejudice to a specific protected right or a likelihood that a jury would be unable to make a reliable decision in a joint trial. *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *United States v. Williams*, 45 F.3d 1481, 1484 (10th Cir. 1995). A showing of potential prejudice is not enough to require separate trials, recognizing the public interest in economy and expedition in judicial administration. *United States v. Dirden*, 38 F.3d 1131, 1140 (10th Cir. 1994). The policy preference for a joint trial is particularly strong when a conspiracy is charged. *United States v. Hardwell*, 80 F.3d 1471, 1486 (10th Cir. 1996). This court has conducted many multiple defendant trials. Prejudice has been avoided by the use of stipulations as to certain facts and agreed redactions from exhibits and testimony. *See, e.g. United States v. Lane*, 883 F.2d 1484, 1501 (10th Cir. 1989).

The McVeigh motion for severance centers on expected testimony of FBI agents about their conversations with Terry Nichols on April 21 and 22, 1995. Government counsel have unequivocally said that they will use some of these statements as admissions of Terry Nichols even if that requires severance. The government's

position is succinctly stated in this paragraph in the brief in opposition to the defendants' motions:

> Nichols' statements are, without question, important to the case against him. The prosecution cannot forego, even upon pain of severance, Nichols' admissions regarding: (1) his April 16 Oklahoma City trip; and (2) his purported truck loan to McVeigh on April 18. The former statements are important both for their truth (showing Nichols' involvement in what other evidence will prove was the conspiracy to bomb a federal building) and for their falsity (showing that Nichols lied about various matters, such as his prior contact with McVeigh and the reason for his trip). The latter statement is important primarily for its falsity, because other evidence will show that Nichols could not have loaned McVeigh his truck at the times and under the circumstances he claimed. There is, under these circumstances, no viable option of redaction, and again the prosecution would urge some form of severance rather than redaction.

Docket entry 2165 at 39-40.

The government unsuccessfully sought a ruling that three "core admissions" may be considered as evidence against both defendants because, in the context of other expected evidence, these particular statements by Terry Nichols inferentially incriminate him, making them statements against his penal interest within the exception to the hearsay rule in Fed. R. Evid. 804(b)(3). In substance, the prosecutors say Terry Nichols admitted: (1) that Terry Nichols met with Timothy McVeigh in Oklahoma City and drove him to Junction City, Kansas, on April 16; (2) that Terry Nichols loaned his truck to Timothy McVeigh

for his use in Junction City, Kansas, on the morning of April 18 and (3) that Terry Nichols removed items belonging to Timothy McVeigh from a storage locker in Herington, Kansas, on April 20.

The FBI reports include these statements among many others made during an interview lasting more than nine hours in the Herington, Kansas police station on April 21. Government counsel say that they do not intend to introduce other Nichols' statements that refer to Timothy McVeigh or that include speculation about the possibility of Mr. McVeigh's involvement in the bombing. The government's argument that Terry Nichols' statements should be considered evidence against Timothy McVeigh was that Terry Nichols connected himself with Timothy McVeigh in ways which Mr. Nichols must have known would subject him to criminal liability. The court ruled that while these statements are admissions as to Terry Nichols, they are hearsay as to Timothy McVeigh because the prosecution did not show that when he made those statements Terry Nichols knew that Timothy McVeigh participated in the bombing of the building. *United States v. McVeigh*, ___ F. Supp. ___ (D. Colo. 1996), 1996 WL 478771. Such knowledge of Mr. McVeigh's guilt would be the minimum basis for drawing any inference that by describing these contacts with Timothy McVeigh, Terry Nichols thought that he was incriminating himself. If these statements of Terry Nichols are taken as true, they tend to incriminate Timothy McVeigh by placing him in Oklahoma City on April 16 and in Junction City on April 18, in light of the government's stated intention to attach significance to his being in those places at those times by other evidence. Terry Nichols' removal of Timothy

McVeigh's property from a storage locker on April 20 may also be incriminating as to Mr. McVeigh in the context of other evidence.

The government now argues that even though testimony about Mr. Nichols' statements is inadmissible hearsay as to Timothy McVeigh, he will not be prejudiced in a joint trial because a properly instructed jury should be expected to disregard such testimony when they evaluate the evidence against Mr. McVeigh. The government also suggests that some of Terry Nichols' explanatory statements should not be classified as hearsay because they will not be offered for their truthfulness. Indeed, to the contrary, the prosecutors say that they will try to prove, by other evidence, that Terry Nichols' explanations for his actions on April 16, April 18 and April 20 are false and that he lied to the FBI to try to avoid his criminal liability. False explanations of incriminating evidence are probative of a consciousness of guilt. *United States v. Hackett*, 638 F.2d 1179, 1186-87 (9th Cir. 1980).

It must now be assumed that Terry Nichols will not testify at a joint trial. The Fifth Amendment prevents the government from calling him as a witness and there is nothing to require him to decide about testifying in his defense before the government concludes its evidence. Therefore, Timothy McVeigh's lawyers will have no opportunity to cross-examine Terry Nichols about his statements. Moreover, because this testimony from FBI agents will not be received as evidence against Timothy McVeigh, his counsel may not even cross-examine the agents on what they say that Terry Nichols said. And, the prosecutors suggest that to avoid any incriminating effect on Mr. McVeigh from any other statements of Terry

Nichols, the court must restrict his lawyers' cross-examination of the agents.

To evaluate Timothy McVeigh's claim of denial of his right of confrontation, the court must expect that at trial government counsel will call one or more of the four FBI agents who talked with Terry Nichols on April 21 and 22, 1995, to testify as to their recollections of what he said about these "core admissions"; that counsel for Mr. Nichols will cross-examine them only on the statements included in their direct testimony; that counsel for defendant McVeigh will not cross-examine the agent witnesses and that the jury will be instructed to consider the agents' testimony only for what they think it shows as to the activities, personal knowledge and state of mind of Terry Nichols. The prosecutors expect to connect up Terry Nichols' statements by evidence that these two men joined together at times to perform acts which resulted in the bombing of the Murrah Building on April 19, 1995. The government lawyers will ask the jurors to be selective in their consideration of the FBI testimony about the Nichols' interview, believing those statements which admit his conduct fitting into their theory of the case, disbelieving his apparently innocent reasons for these actions as fabricated exculpatory explanations and disregarding all of it in deciding the case against Timothy McVeigh. The prosecutors will argue that the reason the jury should disbelieve Terry Nichols' explanations is that other evidence will show a close relationship between these men for several years; that both of them, at times, expressed similar views suggesting a common motivation for the conspiracy charged in count one; and that each of them did things, together and with other persons, to

carry out a common scheme to destroy the Murrah Building and its occupants.

The lawyers for Terry Nichols can be expected to conduct a vigorous cross-examination of the FBI agents, perhaps directly challenging the credibility of their testimony and undoubtedly suggesting that the meaning of the statements attributed to Mr. Nichols on direct examination is distorted unless it is considered in the context of the entire interview and the circumstances under which it was conducted. They will rely on such cases as *Crane v. Kentucky*, 476 U.S. 683 (1986), to assert the right to such cross-examination. Rule 611 gives the court discretion to permit that inquiry, and denial of it to protect against prejudice to Timothy McVeigh would, in turn, severely prejudice Terry Nichols. The court cannot save a joint trial by sacrificing the interests of one defendant to protect the other.

In their attempt to show that Mr. Nichols' entire story is credible and totally consistent with his lack of guilt, his lawyers will probably suggest that any inconsistencies or misstatements were because Terry Nichols was under intense pressure during the more than nine hours that he was interrogated by two teams of FBI agents on April 21 at the police station. While the court has read the agents' written reports of their conversations with Terry Nichols, it has no information about what those agents asked him, what they told him about their suspicions or what they revealed about the investigation. The court must assume that there was interactive conversation during the long interview and there is a high probability that the agents used their skills to keep Mr. Nichols talking to them.

These are subjects appropriate for cross-examination under the rule of completeness.

It is reasonable to anticipate that Mr. Nichols' counsel may attempt to portray Timothy McVeigh as a participant in the bombing of this building who duped his friend Terry Nichols into providing unknowing assistance. Included among the statements of Terry Nichols in the portions of the FBI reports disclosed in the hearing and mentioned in this court's earlier opinion is this: "I feel upset that I am involved, in a sense, because of him, and knowing that I am not." That can be reasonably construed as Mr. Nichols' expression of a belief in Mr. McVeigh's guilt. Timothy McVeigh's lawyers have no chance to ask Terry Nichols whether he said these words or what he meant by them.

There can be no effective separation of Terry Nichols' explanations for his conduct from what he reportedly said Timothy McVeigh told him. For example, the FBI agents reported that Terry Nichols said that he went to Oklahoma City on April 16 at Timothy McVeigh's request to get a television set Mr. McVeigh was returning to Mr. Nichols from his ex-wife and son in Las Vegas and that Mr. McVeigh said his car broke down while he was traveling on his way east to visit his family. To find that explanation false, as the government requests, the jury has several choices. They may infer that (1) Terry Nichols lied about what Timothy McVeigh said, or (2) Timothy McVeigh lied to Terry Nichols about why he was being asked to go to Oklahoma City, or (3) Terry Nichols fabricated the entire story. Mr. Nichols' lawyers may be expected to ask the jury to adopt the second possibility – that any false parts of Terry Nichols' statements resulted

from lies told to him by Timothy McVeigh. The government may be satisfied with either the first or second suggestion. Only Timothy McVeigh has an interest in the third possibility – that all of what Terry Nichols said was false. He will not be able to advance that suggestion through cross-examination if the agents' testimony is not considered as evidence against him. Any effort made by Mr. McVeigh's lawyers to argue such falsity to the jury would contradict the caution that the testimony must not be considered as evidence against Timothy McVeigh.

The agents' testimony about the exculpatory statements of Terry Nichols can only be considered probative of his guilt if they are accepted as an implied admission of his guilt. That interpretation requires findings that Mr. McVeigh was a participant in the bombing, that Terry Nichols knew that Mr. McVeigh was a participant in the bombing and that Terry Nichols narrated a story interweaving true and false statements of fact. Without an opportunity to cross-examine Terry Nichols or the agents, Timothy McVeigh is caught in a dilemma. There will be evidence that Terry Nichols and Timothy McVeigh were associated in several ways over a substantial period of time. The government and counsel for Terry Nichols will disagree about the credibility and meaning of Mr. Nichols' statements about his conduct on these three important dates, but they may well agree about the validity of other evidence linking these two men together in ways that may sound conspiratorial.

The adversary trial process depends upon cross-examination to determine the reliability of the testimony of witnesses. A skilled advocate will put questions which

will reveal any failures or weaknesses in perception, recollection and recounting by the witness, as well as the effects of any character flaws, bias or prejudice he or she may have. Distortions, inaccuracies and incompleteness of direct testimony may also be disclosed as the cross-examiner seeks either to bring out the whole story, or suggest something quite different from what was sought to be proved. The indispensable role of cross-examination is well summarized in the following statement found in *Wigmore*:

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.
>
> Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience.

5 *Wigmore, Evidence* § 1367 (Chadbourne rev. 1974) (footnote omitted).

The historic right of cross-examination was incorporated into the United States Constitution by the Confrontation Clause in the Sixth Amendment. Denial of that right has often created such loss of confidence in jury verdicts as to require reversal of convictions. *Douglas v. Alabama,* 380 U.S. 415 (1965); *United States v. Begay,* 937 F.2d 515 (10th Cir. 1991).

Timothy McVeigh will be profoundly prejudiced by a joint trial of this case. His lawyers cannot question Terry Nichols or cross-examine the FBI agents on what they say Terry Nichols said and they cannot control the cross-examination by Terry Nichols or follow up on any suggestions or inferences of guilt of Timothy McVeigh resulting from it. The latter may have the more severe prejudicial effect if Mr. Nichols' lawyers implicitly accuse Timothy McVeigh of lying to Terry Nichols. In short, Timothy McVeigh may be caught in cross-fire.

Traditionally, courts have relied upon jury instructions to separate the evidence in multi-defendant trials. The efficacy of that practice to avoid unfairness depends upon the level of confidence one may reasonably have in the ability of jurors to exercise their individual and collective discipline to follow such instructions in any particular case.

In *Bruton v. United States,* 391 U.S. 123 (1968), the Supreme Court followed several circuits and state courts in concluding that it was unrealistic to expect a jury to disregard the confession of a nontestifying co-defendant incriminating the nondeclarant defendant. Accordingly,

the Court held that the Sixth Amendment right of confrontation is denied when such evidence is received at a joint trial. The *Bruton* rule was narrowed in *Richardson v. Marsh*, 481 U.S. 200 (1987), where the Court said that if the co-defendant's confession is redacted to exclude any reference to the existence of the defendant, an instruction directing the jury to avoid inferring any link to him may be expected to avoid violation of the Confrontation Clause, even though the hearsay statement may be incriminating in the context of other properly admitted evidence. *Id.* at 211. There is no need to review the succeeding cases in the circuit courts questioning the efficacy of such redaction to avoid any incriminating effect on the nondeclarant defendant when the link-up strongly suggests that the declarant's admission included the co-defendant. The difficulties involved were discussed by the Eighth Circuit Court of Appeals in *United States v. Long*, 900 F.2d 1270, 1278-80 (8th Cir. 1990). Here there are direct references to Timothy McVeigh which, if believed, would be very incriminating in the context of other evidence and which may strongly corroborate some of that evidence.

The government concedes that deletion of Timothy McVeigh's name from Terry Nichols' extrajudicial statements is not possible. Such redaction would destroy any probative value of these statements, making them irrelevant. They have probative value only because they connect both defendants. In the Reply Brief of the United States Regarding Admissibility of Nichols' Statements, government counsel said: "Nichols core statements were incriminating precisely because, and for the most part only because, McVeigh too was involved." Docket entry

1563 at 8. They suggest a chain of inference that Terry Nichols knew that Timothy McVeigh participated in the bombing; Terry Nichols admitted his association with Timothy McVeigh and acts of assistance shortly before and after the bombing; Terry Nichols attempted to avoid implicating himself by giving false neutral explanations for his admitted conduct: therefore, Terry Nichols admitted that he too was guilty as a participant in the crime. The persuasive power of that reasoning depends upon the amount and weight of the evidence against Timothy McVeigh, which will not be known before trial.

At the court's request, government counsel submitted proposed limiting instructions. A copy of them is attached as an appendix to this opinion. A pre-trial evaluation of their projected efficacy is one of the intuitive decisions which a judge must make, based upon his experience with jury trials. The instruction to be given before the agents testify directs the jury to consider Mr. Nichols' implied consciousness of guilt.

> You may consider Mr. Nichols' statements to the FBI only as evidence of his own activities and his personal knowledge and state of mind. I anticipate that the government may ask you to find that certain of Mr. Nichols' statements were true but that others were false and that the alleged falsity suggests a consciousness of guilt on Mr. Nichols' part.

Appendix. As previously discussed, the jury may infer from his statements that Mr. Nichols believed Timothy McVeigh to be guilty. That danger is enhanced by the following language from the proposed final instruction:

> As a matter of law, you may not consider the testimony about Mr. Nichols' statements to the FBI agents in your deliberations about Mr. McVeigh. There is one obvious way for you to conduct your deliberations to make it easier for you to abide by that rule. That is to deliberate first as to whether the government has proved its case against Mr. McVeigh beyond a reasonable doubt. In this part of your deliberations, you could consider evidence admitted against Mr. McVeigh, but you could not consider in any way the evidence about Mr. Nichols' statements to the FBI agents. Once you conclude your deliberations as to Mr. McVeigh, you could then consider the charges against Mr. Nichols. In that part of your deliberations, and only in that part, you could consider the evidence of Mr. Nichols' statements to the FBI agents.

Appendix. The unacceptable risk is that any finding of not guilty as to Timothy McVeigh would be undermined by a determination that Terry Nichols confessed his guilty assistance. In short, there is an unacceptable risk that the jury will use Terry Nichols' extrajudicial statements against Timothy McVeigh in derogation of his Sixth Amendment right of confrontation and the fundamental fairness protection of the Due Process Clause in the Fifth Amendment.

Both defendants seek severance on the ground that their defenses are so antagonistic as to prevent a fair joint trial. The Supreme Court limited the use of antagonistic defenses as a basis for severance, holding that there is no per se rule of severance. More than mere "finger pointing" is required. *See Zafiro v. United States*, 506 U.S. 534, 540-41 (1993). In *United States v. Dirden*, 38 F.3d 1131, 1141

(10th Cir. 1994), the Tenth Circuit Court of Appeals instructed that severance on this ground should be granted only where the defenses are so antagonistic that they are "mutually exclusive." Thus, only when exoneration of one defendant requires incrimination of the other is severance required. That possibility has been shown in the foregoing discussion of the Bruton problem in this case. Counsel for Timothy McVeigh have argued that there is reason to believe the reverse of Mr. Nichols' suggested defense. Thus, there will be an effort to suggest that the whole purpose of Terry Nichols' visit to the Herington police station was to "frame" his friend Timothy McVeigh.

While the defenses of these two men may not fully meet the mutually exclusive standard, there will be substantial and significant differences in the tactical approaches taken by their respective counsel. At times they will have different positions on evidentiary objections, and different approaches to the cross-examination of the government's witnesses and in the presentation of defense witnesses.

The conflict between the defenses of these men is even more apparent if there is a joint penalty phase hearing. Convictions upon one or more of these charged offenses will generate mutually exclusive defenses of their lives because each defendant will try to portray the other as a more culpable perpetrator of the crime. There may be unavoidable prejudice if the defendants choose to testify against each other or if only one defendant testifies on his own behalf. Any efficiencies achieved in a joint liability trial will then be outweighed by extension of the

time necessary for hearing the mitigating evidence presented by each of the defendants. The increased time necessary for a joint penalty phase trial may be critical since the court will no longer have alternate jurors available.

Preference for a joint trial of persons charged with conspiracy and with aiding and abetting crimes assumes efficiencies resulting in conservation of resources, reduction in inconveniences to witnesses and public authorities, avoidance of delays and mitigation of adverse effects on witnesses and victims. Such assumptions must be analyzed for their validity in any particular case and their value may be outweighed by the compelling interest in the fairness and finality of the verdict.

There are efficiencies and advantages in single focused trials. The time needed for jury selection is significantly reduced: the number of defense peremptory challenges is halved and only one defense counsel conducts voir dire questioning. It is easier to apply the rules of evidence when there is a trial of one defendant, particularly with regard to the admissibility of statements offered under Rule 801(d)(2); character evidence under Rule 404(a)(1) and proof of motive, opportunity, intent, preparation, plan, knowledge and identity under Rule 404(b). Given these considerations, it is far from certain that the time required for two separate trials would, in total, be substantially greater than the time required for a joint trial.

The prosecutors raise the possibility of inconsistent verdicts in separate trials as a policy objection to the defense motions. Inconsistent verdicts are possible

whether the defendants are tried together or separately if the jury does give separate consideration to the evidence against each man. The Supreme Court has accepted different outcomes, even though they may be illogical, because of the unique role of the jury as fact-finder in criminal cases. *United States v. Powell*, 469 U.S. 57 (1984).

The government has expressed some concern that the outcome of a first trial will make the selection of a jury problematic for the second defendant to be tried. Surely if a jury can be expected to give separate consideration to each of two defendants in a joint trial, a separate jury in a second single defendant trial should be expected to follow instructions to disregard the verdict of the first jury or any of the events at the time of the first trial. The chances of obtaining fair and impartial juries in two separate trials would certainly be better than attempting to seat a jury after a mistrial or reversal and new trial as a result of prejudicial joinder.

The possibility of a joint trial with separate juries has been considered. Conceptually, that is a convenient solution. Logistically, it is impracticable. If 6 alternate jurors were seated with each jury, the courtroom would have to accommodate 36 jurors for most of the trial. Moreover, the use of two juries would, at best, accommodate only the *Bruton* problem of the Nichols' statements. It would not relieve the prejudice to each of the defendants from their antagonistic defenses requiring different tactics and strategies during the trial proceedings. It is reasonable to anticipate a need for extensive hearings outside the presence of the jury to consider conflicting defense objections and requests for cautionary instructions during the presentation of the evidence, including arguments about

whether both juries can hear particular testimony or see certain exhibits. The resulting delays would interrupt the rhythm and flow of the proceedings and risk unforeseeable adverse consequences.

Upon these findings that the government's intended use of testimony about statements made by Terry Nichols to FBI agents would deny Timothy McVeigh his right to confront all witnesses against him under the Sixth Amendment to the United States Constitution, and that a joint trial of these defendants presents such an unacceptable risk of prejudice to both of them as to require separate trials, it is now

ORDERED that the defendants' motions for severance are granted to the extent that the trials of the charges as to each defendant will be conducted separately, and it is

FURTHER ORDERED that the first named defendant, Timothy McVeigh, will be tried first, and it is

FURTHER ORDERED that all pre-trial proceedings and motions hearings, unless otherwise expressly ordered, shall continue to be heard jointly.

Dated: October 25th, 1996

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch,
Chief Judge

APPENDIX

LIMITING INSTRUCTION AT TIME OF WITNESS TESTIMONY

This case is really two trials in one. In one case you are asked to judge whether the government has proven beyond a reasonable doubt that Timothy McVeigh is guilty of each of the charges in the indictment. In the other case you are asked to decide whether the government has proven beyond a reasonable doubt that Terry Lynn Nichols is guilty of each of the charges in the indictment. Obviously, both men are here on trial together, but you must give separate consideration to each of them just as you would if they were being tried separately.

Thus far, all [most] of the evidence you have heard has been admissible against both defendants. You may consider that evidence when you separately consider the proof against each defendant. That is about to change. The next witness will testify about statements Mr. Nichols allegedly made to the FBI. This witness's testimony is not admissible against Mr. McVeigh. You must limit consideration of this witness's testimony to Mr. Nichols.

Under no circumstances may you consider this witness's testimony in the case against Mr. McVeigh. If Mr. McVeigh were being tried separately, this evidence could not be offered. A jury at a separate trial for Mr. McVeigh would not even hear this evidence. You will hear the evidence of course, but you must totally ignore it when you consider the evidence against Mr. McVeigh. Indeed, because this testimony cannot be considered evidence

against Mr. McVeigh, his counsel will not even need to cross-examine this next witness.

You may consider Mr. Nichols' statements to the FBI only as evidence of his own activities and his personal knowledge and state of mind. I anticipate that the government may ask you to find that certain of Mr. Nichols' statements were true but that others were false and that the alleged falsity suggests a consciousness of guilt on Mr. Nichols' part. Whether or not there is evidence of false statements, whether any such evidence points to a consciousness of guilt, and the significance, if any, to be attached to such evidence, are matters exclusively within the province of the jury as the sole judges of the facts of this case. I caution you, however, that consciousness of guilt, if any, is based on personal knowledge and circumstances. Any testimony concerning a false exculpatory statement by Mr. Nichols is in no way attributable to Mr. McVeigh and may not be considered by you in determining whether the government has proven the charges against Mr. McVeigh beyond a reasonable doubt.

I repeat that under no circumstances are you to consider Mr. Nichols' FBI statements, whether you find them to be true or false, in your deliberations against Mr. McVeigh. Consideration of those statements in the case against Mr. McVeigh would violate not only Mr. McVeigh's constitutional rights but also your oaths and responsibilities as jurors. (Footnotes omitted.)

Limiting Instruction
At Close of Case

[Repeat the essence of the charge proposed above and add the following.]

As a matter of law, you may not consider the testimony about Mr. Nichols' statements to the FBI agents in your deliberations about Mr. McVeigh. There is one obvious way for you to conduct your deliberations to make it easier for you to abide by that rule. That is to deliberate first as to whether the government has proved its case against Mr. McVeigh beyond a reasonable doubt. In this part of your deliberations, you could consider evidence admitted against Mr. McVeigh, but you could not consider in any way the evidence about Mr. Nichols' statements to the FBI agents. Once you conclude your deliberations as to Mr. McVeigh, you could then consider the charges against Mr. Nichols. In that part of your deliberations, and only in that part, you could consider the evidence of Mr. Nichols' statements to the FBI agents.

This is only a suggestion about the order in which you consider the charges against the defendants; you are free to structure your deliberations as you think best. But whatever order you decide to use in considering the charges, you must not rely in any way on the evidence of Mr. Nichols' statements to the FBI agents in deciding whether the government has proved the charges against Mr. McVeigh beyond a reasonable doubt.